No. 91-810

In The

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF BURLINGTON,
Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, AND ROSE A. BESSETTE
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA AND SEVERAL OF THE STATES, IN SUPPORT OF REVERSAL

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel
Counsel of Record

Counsel for the District of Columbia
Room 305, District Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

[Additional Counsel Listed in Brief]

JAMES H. EVANS
Attorney General of Alabama
11 South Union Street
Montgomery, Alabama
36130
(205) 242-7300

DANIEL E. LUNGREN
Attorney General of California
1515 K Street, Suite 600
Sacramento, California
94244-2550
(916) 324-5157

ROBERT A. BUTTERWORTH
Attorney General of Florida
Department of Legal Affairs
The Capitol
Tallahassee, Florida
32399-1050
(904) 487-1963

ROLAND W. BURRIS
Attorney General of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6217

ROBERT T. STEPHAN
Attorney General of Kansas
2nd Floor
Kansas Judicial Center
Topeka, Kansas 66612-1597
(913) 296-2215

SCOTT HARSHBARGER
Attorney General of
Massachusetts
1 Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

SUSAN B. LOVING
Attorney General of Oklahoma
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania
17120
(717) 787-3391

MARK W. BARNETT
Attorney General of
Sourth Dakota
500 East Capitol Avenue
Pierre, South Dakota
57501-5070
(605) 773-3215

PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JAMES E. DOYLE
Attorney General of Wisconsin
123 West Washington Avenue
Madison, Wisconsin
53707-7857
(608) 226-9945

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (continued)

Page

STATUTES

OTHER AUTHORITIES

No. 91-810

In The

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF BURLINGTON,
Petitioner,

v.

ERNEST DAGUE, SR., ERNEST DAGUE, JR.,
BETTY DAGUE, AND ROSE A. BESSETTE
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE*, THE DISTRICT OF COLUMBIA AND SEVERAL OF THE STATES, IN SUPPORT OF REVERSAL

INTERESTS OF *AMICI CURIAE*

Amici are the District of Columbia and several of the States. These governments, as well as local governments within the States, are subject to numerous federal statutes that provide for an award of reasonable attorney's fees to prevailing plaintiffs. Increasingly under these statutes, prevailing plaintiffs have requested, and have been granted, fee awards in excess of lodestar fee awards — that is, awards in excess of the product of reasonable hourly rates charged by attorneys and the number of hours reasonably expended on the litigation. These additional awards are made in cases in which counsel for plaintiffs have agreed to represent their clients on a contingent-fee, or partial contingent-fee, basis. They purport to protect counsel against the risk of receiving

no fee, or a fee that does not fully reflect the value of the time expended on the case, should they lose. Such risk enhancements, which may equal already costly lodestar awards, have had a severe impact on the public fisc and on the ability of state and local governments to pursue litigation policies they believe will promote the public interest. Such undesirable effects are likely to become even greater, unless this Court rules that risk enhancement is not authorized by Congress in fee-shifting provisions that merely permit an award of a reasonable attorney's fee to a prevailing party.

As a consequence, *amici* urge this Court to reverse the decision of the Second Circuit in this case requiring the City of Burlington, Vermont, to pay a risk enhancement to counsel for plaintiffs who prevailed in litigation against it pursuant to two federal fee-shifting statutes. This Court should rule that a risk enhancement may never be awarded under the typical federal fee-shifting statute.

SUMMARY OF THE ARGUMENT

Congress has enacted more than 100 statutes that permit courts to award a reasonable attorney's fee to a prevailing party in litigation, including awards to prevailing plaintiffs against state and local governments. The language of such fee-shifting provisions should not be interpreted to permit lodestar awards to be enhanced simply because counsel for plaintiffs have agreed to represent them on a contingent-fee basis. Risk enhancement is, in effect, an award of fees for litigation in which plaintiffs have not prevailed, and it compels defendants to pay attorney's fees for time expended by plaintiffs' counsel in other cases in which defendants have prevailed.

Neither the purpose nor the legislative history of fee-shifting legislation supports such a result. Instead, as all but one of this Court's decisions have indicated, there is a strong presumption that a reasonable attorney's fee that may be

awarded against a defendant pursuant to the typical fee-shifting statute is a lodestar award, no more and no less. In addition, this Court has ruled that parties who defend such cases should not be required to pay fees for litigation that does not establish a violation of the law on their part. Finally, this Court has made plain that there is no necessary correlation between the reasonableness of fees that *a client* may agree to pay his counsel pursuant to a contingent-fee agreement and the reasonableness of fees that *a defendant* should be obliged to pay to plaintiff's counsel when a plaintiff prevails in a case.

In this Court's only decision addressing the propriety of risk enhancements under the typical fee-shifting statute, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), this Court denied a risk enhancement but in a sharply divided decision. A plurality adopted as an initial position that fee awards may never be enhanced to compensate for risk of loss because, *inter alia*, such enhancements compel defendants to pay fees for cases in which plaintiffs do not prevail and, if calculated on a case-by-case basis, would result in awards against defendants that vary inversely with the strength of the case against them. *Id.* at 724-27. The plurality's secondary position was that, if risk enhancement is permissible, such awards may be made only in exceptional cases in which plaintiffs faced a real risk of not prevailing and such awards may not be greater than one-third of the lodestar. *Id.* at 730.

Justice O'Connor, who concurred in part and in the judgment, refused to rule out the possibility of risk enhancement but agreed that any risk enhancement could not be based on a case-by-case assessment of the merits. *Id.* at 731, 734. Instead, she wrote, courts should examine the market to determine whether a risk enhancement is needed, and in what amount, and should make those determinations on a class-wide basis. *Id.* at 731-34.

Finally, the dissent, although agreeing that risk enhance-

ment should not be based on the likelihood of success in a particular case, would have permitted a risk enhancement in each and every case to the extent that plaintiffs' counsel were not able to mitigate the risk of loss by contractual arrangements with their clients. *Id.* at 747-49. In addition, the dissent would have permitted an extra risk enhancement in special circumstances. *Id.* at 751-52.

Amici believe that the experiences of the last five years under the *Delaware Valley II* regime demonstrate the correctness and wisdom of the initial position taken by the *Delaware Valley II* plurality — that risk enhancement of a lodestar fee award is improper. Those experiences have revealed that the approaches set forth in the plurality's secondary position, and in Justice O'Connor's concurring opinion, as well as in the across-the-board basic contingency enhancement advocated by the dissent, cannot be applied in a manner that results in a rational fee-shifting scheme — one that ensures that persons with meritorious claims, but modest means, secure counsel, but avoids windfalls to attorneys.

Some of the problems are illustrated by the case now under review. The risk enhancement award here is based on an assessment of the potential merits of the case, as they might have been perceived at the outset of the litigation; it is also based on factors, such as delay in payment and the complexity of the case, that are either separately compensable or included in the lodestar. These flaws, as well as others, are also illustrated by the risk enhancement rule adopted, and then rejected, by the United States Court of Appeals for the District of Columbia Circuit. In *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir.), *reh'g denied en banc*, 884 F.2d 1405 (D.C. Cir. 1989), and in *King v. Palmer*, 906 F.2d 762 (D.C. Cir. 1990),[1] the court developed a rule that there should be a 100%

[1] For the convenience of the Court, the panel decision in *King* is reproduced in the appendix. App. 49A-67A.

enhancement of the lodestar in each and every case to the extent that it was contingent. This rule has now been rejected by the court sitting *en banc* in favor of a rule that risk enhancement is never permitted in the absence of express Congressional authorization. *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991), *petition for a writ of certiorari pending*, No. 91-1370.[2]

Furthermore, assuming that it is proper for this Court to determine whether risk enhancement is needed, *Dague* and the decisions of the D.C. Circuit make plain that the evidence heretofore adduced is woefully insufficient to support a conclusion that risk enhancement is needed to ensure that persons with meritorious claims, but modest resources, can secure legal representation. Instead, the evidence merely establishes what some attorneys believe is a desirable level of compensation, as if the purpose of statutory fee-shifting were to ensure that attorneys replicate the returns they seek to achieve through private arrangements with clients.

Finally, the experiences of *amici* under the *Delaware Valley II* regime make two other matters plain. First, requests for risk enhancement call upon the judiciary to make legislative judgments that properly belong to Congress. Second, judicial awards of risk enhancement, rather than reflecting the market, artificially alter the market in a manner that produces windfalls for attorneys.[3]

[2] For the convenience of the Court, the *en banc* decision in *King* is reproduced in the appendix. App. 1A-48A.

[3] Citations to the appendix attached to this brief are designated as "App. —." Citations to the appendix to the petition for the writ of certiorari in *City of Burlington v. Dague* are designated "*Dague* Cert. Pet. App. —." Citations to the Petition for a Writ of Certiorari in *King v. Palmer*, No. 91-1370, are designated "*King* Cert. Pet. —."

ARGUMENT

I. THE TYPICAL FEE-SHIFTING STATUTE SHOULD NOT BE INTERPRETED TO PERMIT PREVAILING PLAINTIFFS TO SECURE AN AWARD OF FEES BEYOND THE LODESTAR IN ORDER TO COMPENSATE THEIR COUNSEL FOR RISK OF LOSS.

In enacting fee-shifting legislation, Congress intervened in the marketplace to encourage the vindication of selected federal rights. The issue in this case is the extent of Congress's intervention. In resolving this issue, "the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account." *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 764 n.4 (1989). When the competing rights that Congress established and the competing interests it normally takes into account are examined, *amici* believe that this Court must conclude that Congress authorized only lodestar awards to prevailing plaintiffs.

A. Prevailing Plaintiffs and the Lodestar Award.

The language of the typical federal fee-shifting provision, like the language of the fee-shifting provisions at issue in this case, merely permits courts to award a reasonable attorney's fee to a party who prevails in litigation.[4] Both

[4] The fee-shifting provisions at issue in this case are those contained in the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and in the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq*. Both provisions permit a "reasonable attorney" fee to be awarded to the "prevailing or substantially prevailing party . . .." 33 U.S.C. § 1365(d); 42 U.S.C. § 6972(e). This Court has ruled that federal fee-shifting provisions containing this language, or language similar to it, should be interpreted in the same way. *See, e.g., Independent Federation of Flight Attendants v. Zipes, supra*, 491 U.S. at 758 n.2 (explaining that 42 U.S.C. § 1988 was patterned after the fee provision of Title VII and, as a consequence, they should ordinarily be "interpreted alike"); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (fee-shifting provision of Clean Air Act should be interpreted like 42 U.S.C. § 1988, even though the Clean Air Act merely states that parties may secure fees and does not specify prevailing parties).

before and after *Delaware Valley II*, this Court has ruled that a lodestar award is presumptively a reasonable attorney's fee that may be imposed against an unsuccessful defendant under such fee-shifting provisions. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 94-95 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) ("*Delaware Valley I*"); *Blum v. Stenson*, 465 U.S. 886, 898-901 (1984). A lodestar award, properly computed, compensates counsel for all time reasonably expended on a case at a reasonable hourly rate.

This Court has also made clear that fee-shifting statutes should be interpreted to minimize defense subsidies of unsuccessful litigation and that these statutes do not ordinarily permit fees to be awarded against parties for litigation that does not establish a violation of law on their part. Thus, in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), this Court ruled that a plaintiff who prevails on one claim in a case may not recover fees for time spent on distinct unsuccessful claims.

Furthermore, in *Independent Federation of Flight Attendants v. Zipes, supra*, this Court ruled that prevailing plaintiffs, or their counsel, may not recover their fees when fee-shifting would require a party to pay fees for litigation which did not establish that it engaged in wrongdoing. The issue in *Zipes* was whether an intervenor — there a union — in a Title VII case brought by employees against their employer could be held liable for lodestar fees incurred by prevailing plaintiffs in successfully meeting the union's arguments. This Court ruled that an intervenor may not ordinarily be held liable for such fees. Instead, an intervenor may be held liable only in those circumstances in which a plaintiff who loses may be held liable for a defendant's fees under a fee-shifting statute — only if its claims were "frivolous, unreasonable, or without foundation . . .." *Id.* at 766.

In so ruling, this Court assumed that the time spent by plaintiffs meeting the arguments of the intervening union, including arguments against liability, would not be compensated at all. *Id.* at 762. However, this fact had to be balanced against the fact that the intervenor had not been found

guilty of violating plaintiffs' rights. The Court stated: "Even less with regard to an innocent intervenor than with regard to an allegedly lawbreaking defendant would Congress have wished to 'distort' the adversary process . . . by giving the plaintiff a disproportionate advantage with regard to fee entitlement." *Id.* at 764. As this Court explained:

> . . . [N]othing in the statute gives . . . [prevailing plaintiffs] hegemony over all the other rights and equities that exist in the world. Here as elsewhere, the judicial role is to reconcile competing rights that Congress has established and competing interests that it normally takes into account.

Id. at 764 n.4.

One of the rights that Congress has established in fee-shifting legislation is that a defendant who prevails in litigation brought pursuant to such legislation is not obliged to pay plaintiff's attorney's fees. Risk enhancement undermines this right. Risk enhancement is sought precisely because, in some cases, plaintiffs fail to establish wrongdoing by defendants. It is thus a defense-paid subsidy for unsuccessful litigation. As the plurality in *Delaware Valley II* explained:

> On a more fundamental level, . . . using the risk of loss to increase the lodestar figure compensates attorneys not only for their successful efforts in one case, but for their unsuccessful claims asserted in related cases. This not only "encourag[es] marginal litigation," but raises "the reasonable question of 'why the subsidy [for unsuccessful litigation] should come from the defendant in another case.'"

Delaware Valley II, *supra*, 483 U.S. at 719-20, *quoting Laffey v. Northwest Airlines, Inc.* 746 F.2d 4, 27 n.138 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985).[5]

Hensley and *Zipes* thus strongly support the principle that a defendant, whom Congress has exonerated from liability

[5] *Laffey* was overruled in part in *Save Our Cumberland Mountains v. Hodel, Inc.*, 857 F.2d 1516 (D.C. Cir. 1988) *(en banc)*.

for plaintiff's attorney's fees in a case in which defendant prevails, should not then be obliged to subsidize this loss in another case by payment of a risk-enhanced award to a plaintiff who might have lost but who did not. If, under *Hensley*, a defendant need not pay even a lodestar award to a prevailing plaintiff for hours spent on distinct claims on which the plaintiff did not prevail, the "same logic" dictates that this defendant should not have to pay a risk enhancement to that plaintiff because in a different case, a plaintiff did not prevail. *Laffey v. Northwest Airlines, Inc.*, 746 F.2d at 27.

Similarly, insofar as risk enhancement is concerned, a defendant, like the *Zipes* intervenor, is a party that is being asked to pay fees because of litigation which did not establish any wrongdoing on its part. Furthermore, defendants, in cases pursuant to federal fee-shifting statutes, are already disadvantaged with respect to fee entitlement, even without risk enhancement. Fee-shifting statutes essentially authorize one-way fee-shifting to prevailing plaintiffs because prevailing defendants, unlike prevailing plaintiffs, ordinarily may not recover their fees. For prevailing defendants to recover fees, they must demonstrate that plaintiffs' action was "frivolous, unreasonable, or without foundation . . .." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The conditions under which prevailing plaintiffs and prevailing defendants may receive lodestar fee awards thus sharply tilt the adversary process in favor of plaintiffs. To permit counsel for plaintiffs to receive enhanced fee awards because they *might* have lost that case, or *may* have lost others, would distort the adversary process even more and would confer on plaintiffs a disproportionate advantage in securing fee awards. See App. 67A (Williams, J., concurring).

The premise underlying requests by attorneys for a risk enhancement is that Congress, in altering the American Rule on fee-shifting to provide for an award of a reasonable attorney's fee to a prevailing party, must have intended to require defendants to pay an award reflecting the premium a private

client might agree to pay from the fruits of a successful lawsuit in exchange for free representation should the case be unsuccessful. Put another way, Congress must have intended to incorporate into fee-shifting the private-market model of contingent-fee contracts, but with defendants paying the bill rather than the client.

This premise overlooks the rights of defendants that Congress established in fee-shifting legislation as well as the interests of defendants that Congress normally would have taken into account. Court-ordered fee awards pursuant to the typical fee-shifting statute may run against the public, as they may whenever the United States, the District of Columbia, the States, or local governments are defendants. Furthermore, there are significant differences between attorney-client fee agreements and court-ordered fee awards.

Thus, when Congress has focused on the competing interests presented in cases against government, as it did in enacting the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, it has taken steps to protect the public fisc. Under the EAJA, a prevailing plaintiff may recover fees against the United States only if a court finds that the position of the United States was not substantially justified. Furthermore, the EAJA, which provides that fee awards "shall be based on market rates," (28 U.S.C. § 2412 (a)(2)(A)), also places a general cap on the hourly rate that may be charged. *See Pierce v. Underwood*, 487 U.S. 552 (1988). The EAJA does not, of course, impeach the validity of this Court's more generous lodestar approach under the typical fee-shifting statute. It is, however, evidence that the public fisc is one of the interests Congress normally considers in enacting fee-shifting statutes that impose obligations on government and that the interest of prevailing plaintiffs in recovering their attorney's fees is not always predominant.

In addition, in enacting fee-shifting legislation, Congress was cognizant of the traditional private contingent-fee arrangement, because it recognized that such arrangements, in some instances, did not offer incentives to attorneys to

take on cases having no prospect of a substantial damages award. In a case having such a prospect, however, a client who cannot pay an attorney his usual fee may agree to pay a premium for legal services should the attorney succeed.

Free legal services confer a substantial benefit on a client. In exchange for that benefit, it is reasonable for the attorney to charge a fee to the client, if the case is won, that is greater than the fee a fee-paying client would be charged for the time expended. In such a case, the client is the direct beneficiary of the agreement, and the attorney, who usually agrees to a fee that is measured by a percentage of any damages award, has an incentive not only to win but also to litigate the case efficiently. The less time an attorney spends in winning the case, the greater is his profit.

By contrast, defendants, who pay fees pursuant to fee-shifting legislation, do not bargain with plaintiffs' counsel over the terms of a fee agreement and secure no benefit from it. Furthermore, if such a case is brought on a contingent-fee basis, the plaintiff has no incentive to monitor how much time his attorney spends on it and an attorney's incentive to be efficient may be reduced because the defendant will be obliged to pay for all time reasonably spent on the litigation at his market rates.

Given these differences, this Court should not attribute to Congress a purpose to shift to defendants responsibility to pay a premium that a client might have agreed to pay for free representation, or for representation at rates below those usually charged by an attorney. There is no reason to assume that, under fee-shifting, Congress intended to make defendants, including public defendants, act as insurers for misjudgments by plaintiffs' attorneys. Put another way, there is no reason to assume that Congress intended to protect attorneys for plaintiffs against the consequences of their errors in assessing the merits of a case and to have that protection paid in part by hard-pressed taxpayers.

In short, this Court should not interpret Congress's directive to courts to award a reasonable attorney's fee to a pre-

vailing party as a directive that defendants must pay fee awards to plaintiffs' counsel to compensate counsel for risk of loss in contingent-fee cases. Instead, given the competing interests that Congress normally takes into account, this Court should conclude that Congress intended that counsel be paid only for all time reasonably expended on a case.

B. The Legislative History.

The limited legislative history addressing the issue of what constitutes a reasonable attorney's fee under the typical federal fee-shifting statute does not support risk enhancement. This history consists principally of the Senate and House Reports accompanying 42 U.S.C. § 1988, S. Rep. No. 94-1011 (1976); H.R. Rep. No. 94-1558 (1976). These reports cite with approval *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), a decision that listed 12 factors that should be considered in calculating a reasonable attorney's fee under a fee-shifting statute, including whether the fee for a case is fixed or contingent.[6]

To the extent that this legislative history is pertinent, it supports the lodestar approach that this Court has adopted. Thus, as this Court stated in *Blanchard v. Bergeron*, "[t]he legislative history . . . is instructive insofar as it tells us: '*In computing a fee award, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter.*' " 489 U.S. at 91, quoting S. Rep. 94-1011 at 6 (internal quotation marks omitted) (emphasis added). Furthermore, this Court has eliminated the independent significance of most of the *Johnson* factors. For example, this Court has "specifically held . . . that the 'novelty [and]

[6] The Senate Report also approvingly cites three district court cases applying in various ways *Johnson's* 12 factors. S. Rep. No. 94-1011 at 6. These three cases have been analyzed by this Court on a number of occasions. *See, e.g., Blanchard v. Bergeron, supra*, 489 U.S. at 91-93; *Delaware Valley II, supra*, 483 U.S. 723-24; *Blum v. Stenson, supra*, 465 U.S. at 893-95.

complexity of the issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Delaware Valley I, supra*, 478 U.S. at 565, *quoting Blum, supra*, 465 U.S. at 898-900.

As noted, the legislative history refers to *Johnson*, and *Johnson* states that one factor a court should consider is whether the fee for a case is fixed or contingent. This reference does not support a risk enhancement, however, because *Johnson* goes on to suggest that the purpose of this inquiry is to set a cap on a fee that may be awarded under a fee-shifting statute. *Johnson* states: "In no event . . . should the litigant be awarded a fee greater than that he is contractually bound to pay, if indeed the attorneys have contracted as to amount." 488 F.2d at 718.

In *Blanchard v. Bergeron*, of course, this Court decided that this reference did not establish a Congressional intent to cap fee awards, and instead unanimously ruled that a contingent-fee agreement may not impose a ceiling on a statutory fee award, computed by multiplying a reasonable hourly rate by the number of hours reasonably expended. In so ruling, this Court underscored the presumption that the lodestar is a reasonable attorney's fee for defendants to pay under the typical fee-shifting statute. Thus, in *Blanchard*, the Court reiterated that such a fee-shifting statute:

> contemplates reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, *no more and no less*. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way.

Id. at 93 (emphasis added). Finally, in rejecting the argument that a statutory fee award against a defendant in excess of that permitted by a contingent-fee agreement will result in a windfall to attorneys, the Court stated:

> . . . [T]he very nature of recovery under [the typical fee-shifting statute] is designed to prevent any such "windfall." Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim.

Id. at 96.

In short, the legislative history, to the extent that it is relevant and instructive, indicates that attorneys receiving fees pursuant to fee-shifting statutes are entitled to lodestar awards, no more and no less.

C. Reasonable Client-Paid Fees and Reasonable Fee-Shifting Awards.

Given the obvious differences between a purely private fee agreement and fee liability imposed by law, there is no apparent reason to equate a reasonable fee that *a client* may agree to pay his counsel with a reasonable fee a *defendant* may be obliged to pay under a fee-shifting statute. Indeed, this Court has not done so.

Thus, as this Court unanimously ruled in *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990), plaintiffs' counsel may enforce promises by their contingent-fee clients to pay them fees well in excess of a lodestar fee award. In *Venegas*, this Court upheld a contract in which the client agreed to pay his attorney 40% of any damages award; permitted his attorney to seek fees from the defendant under 42 U.S.C. § 1988; and provided that any statutory fee award would be applied against the fee for which the client was responsible.

The client received a damages award of $2.08 million; and the court awarded a statutory fee against defendants in the amount of $117,000, which consisted of a lodestar award doubled for competent performance. When the client refused to honor his contract, his attorney sued him for fees of $406,000.

In upholding the agreement, the Court assumed that *Delaware Valley II* would not have authorized a defense-paid risk enhancement of that magnitude. Nevertheless, it ruled that § 1988 did not invalidate the contingent-fee agreement even though the fee privately agreed to turned out to be seven times the lodestar award.

On the other hand, as the Court ruled in *Blanchard*, a contingent-fee agreement, bargained for in the marketplace and presumably producing a reasonable fee, does not place a cap on a statutory fee award that an attorney may recover from the defendant. Nor, as this Court ruled in *Riverside v. Rivera*, 477 U.S. 561 (1986), need a statutory fee award be proportionate to the award of damages received in a case, as the fee under the typical private contingent-fee contract necessarily must be. There, this Court upheld a statutory fee award of $245,456.25 in a case that produced a damages award of only $33,350.00.

II. THE EVIDENCE IN *DAGUE*, AS IS TYPICAL IN CASES ATTEMPTING TO APPLY *DELAWARE VALLEY II*, IS WOEFULLY INADEQUATE TO ESTABLISH THAT RISK ENHANCEMENT IS NECESSARY TO ENSURE THAT PERSONS WITH MERITORIOUS CLAIMS UNDER FEDERAL FEE-SHIFTING LEGISLATION SECURE COUNSEL.

Following *Delaware Valley II*, courts across the country struggled to determine whether, and in what amount, a risk enhancement is necessary to ensure that persons with meritorious claims under fee-shifting statutes secure counsel. In this struggle, courts often asked whether, without risk en-

hancement, a person with a meritorious claim would have substantial difficulties obtaining counsel. The Second Circuit in *Dague* took an *ad hoc* approach to this concept, an approach that reflects elements of the plurality's secondary position in *Delaware Valley II* and of Justice O'Connor's concurring opinion. Another approach drew upon Justice O'Connor's class-based, market analysis and reflected elements of the dissent's basic contingent-fee analysis. This approach was adopted by panels of the District of Columbia Circuit in *McKenzie* and *King*, and then overturned *en banc*.

Despite the differences in these approaches, they have important elements in common: (1) an assumption that courts should, and can, make judgments on the availability and level of risk enhancement under federal fee-shifting statutes even though these judgments are legislative, not judicial, and even though judicial judgments on risk enhancement are likely to alter the market rather than reflect it; (2) an assumption that whatever burden plaintiffs must satisfy to demonstrate need for a risk enhancement may be discharged by self-serving and anecdotal attorney affidavits even though such affidavits, in important respects, demonstrate that a lodestar award, properly computed and adjusted for delay, is adequate to attract counsel, and even though the plaintiffs before the court had no difficulty obtaining counsel without an assurance of a premium for risk; and (3) assumptions that each and every attorney in the market is an attorney fully employed doing work for fee-paying clients and that the only motive attorneys have in representing clients is to maximize profits.

Amici submit that each of these assumptions is erroneous and that *Dague*, as well as the cases in the D.C Circuit, demonstrate that plaintiffs have utterly failed to show that risk enhancement is necessary. First, as *amici* already have discussed, courts should not inquire about need because Congress did not authorize risk enhancements under the typical

fee-shifting statute. In addition, for the reasons set forth in part III of this brief, the judgments that must be made to authorize risk enhancements are judgments that are legislative, not judicial, in character. Concomitantly, judicial judgments on risk enhancement are bound to alter the market artificially, not to reflect how the market operates.

Second, plaintiffs and their attorneys may not discharge their burden to show need for risk enhancement by marshalling affidavits from attorneys that are anecdotal in content and self-interested in motivation. Thus, in *Department of Labor v. Triplett*, 494 U.S. 715 (1990), this Court characterized a record based on attorney affidavits virtually identical to the record in *Dague*, as "blatantly insufficient to meet [the] . . . burden of proof, even if entirely unrebutted." *Id.* at 724. The affidavits in *Dague*, like the affidavits in *Triplett*, are "small in volume, anecdotal in character, and self-interested in motivation . . .." *Id.* at 725. The attorney affidavits in *McKenzie* and *King* are similar in content and motivation to those in *Dague*, and although they are more numerous, this can hardly be regarded as significant in view of the fact that there are far more attorneys in Washington, D.C., than there are in Burlington, Vermont. Here, as in *Triplett*, moreover, the hard record evidence, as well as the attorney affidavits, undercut in important respects the claim that risk enhancement is needed. Overall, the records in *Dague*, *McKenzie*, and *King*, far from establishing a need for a risk enhancement, permit just the opposite inference.

Finally, as *Dague*, *McKenzie*, and *King* demonstrate, not all attorneys in this country are fully engaged doing work for fee-paying clients. In addition, as *McKenzie* and *King* demonstrate, there are a range of market players, including not-for-profit legal services organizations, and for-profit attorneys and firms willing to do work on a *pro bono* basis. These attorneys, of course, are entitled to lodestar fee awards at market rates should they prevail. Lodestar awards,

of course, compensate legal services organizations at levels that exceed their costs and change dramatically the rewards of *pro bono* representation.

A. *Dague*.

In *Dague*, plaintiffs' counsel requested a 100% risk enhancement. They supported this request by five attorney affidavits. Two of these affidavits were submitted by counsel for plaintiffs, Richard N. Bland and William W. Pearson; three were from attorneys not associated with the case.

The Bland affidavit made two principal points: (1) "An important factor in this firm's decision to pursue [this case] . . . was the *opportunity* to have any eventual award of attorneys fees enhanced by the Court beyond the lodestar amount;" and (2) " . . . I am of the opinion that Plaintiffs would have faced extreme difficulties in finding other local counsel of similar experience to pursue their claims . . . on a hourly rate to be paid only on the contingency of success." Bland Aff. ¶ 9 (emphasis added). Mr. Pearson, in turn, explained that most counsel in complex environmental cases filed in Vermont are from Boston, New York City, and Washington, D.C. Pearson Aff. ¶ 4. Risk enhancement was needed because, in Mr. Pearson's "considered judgment[,] . . . plaintiffs could have found no other attorneys to represent them other than Attorney Bland and myself." Pearson Aff. ¶ 8. The bases for that conclusion were: the case was fully contingent; there are few attorneys in Vermont who are experienced environmental attorneys; the defendant was a municipality, a factor that "increas[es] the uncertainty of strategy and outcome;" and the time expended on the case was substantial. Pearson Aff. ¶ 8.[7] The three attorneys not associated with the case merely stated that when they, or

[7] As this Court ruled in *Delaware Valley II*, however, the fact that a "defendant is difficult or obstreperous does not enter into assessing the risk of loss or determining whether that risk should be compensated." 483 U.S. at 716.

attorneys they know, take cases on a contingent-fee basis, they attempt to set the percentage of recovery allocable to their fees at a level that would be greater than they would receive had the clients been able to pay on a hourly basis.

The reality revealed by the record in *Dague*, however, is somewhat different from the purpose for which the attorney affidavits were submitted. Here, counsel took the case on a contingent-fee basis even though there was only a possibility, not a probability, and certainly not a certainty, of receiving an enhanced fee award should they prevail. And, the affidavits do not state that petitioners had any difficulty persuading Messrs. Bland and Pearson to work on their case in these circumstances.

The trial court, nevertheless, granted a 25% enhancement, applying a test that asked "whether '[w]ithout the *possibility* of a fee enhancement . . . competent counsel *might* refuse to represent [environmental] clients thereby denying them effective access to the courts.' " *Dague* Cert. Pet. App. 132a (emphasis added) (brackets supplied by court) (internal quotation marks omitted). The bases for the 25% enhancement were: this was a contingent-fee case that precluded counsel from undertaking fee-paying employment; the risk of not prevailing was "substantial," as "evidenced in part by the court's denial of plaintiffs' motion for a preliminary injunction;" plaintiffs did not "ultimately prevail until after trial;" and there was "delay in receiving payment." *Dague* Cert. Pet. App. 131a-33a. The trial court rejected the argument that enhancement of the lodestar was proper based on the novelty of the issues, the complexity of the litigation, and the skill and experience of counsel because these factors are reflected in the lodestar. *Dague* Cert. Pet. App. 131a.

The Second Circuit, in affirming, observed that the case was fully contingent and that the trial court had determined that "the risk of not prevailing was substantial." *Dague* Cert. Pet. App. 37a. In addition, the Second Circuit noted that the trial court, "[a]fter considering the . . . affidavits

on file, . . . also [had] found that absent an opportunity for enhancement to balance the risk of losing entirely, plaintiff[s] would have faced substantial difficulty in obtaining counsel of reasonable skill and competence for this difficult case in a complicated field of law." *Dague* Cert. Pet. App. 37a.

These decisions are flawed for several reasons. First, both the trial court and the Second Circuit took into account the risks of the specific case in permitting an enhancement.[8] Second, the trial court considered: (1) the length of the litigation in its risk enhancement award, even though that element should be reflected in the lodestar; and (2) plaintiffs' counsel's delay in receiving their fees, even though this element is quite distinct from risk. *See, e.g., Delaware Valley II, supra*, 483 U.S. at 716; *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Third, preclusion of other employment is analytically distinct from risk, and irrelevant — since counsel received a lodestar award for the time they reasonably expended on the litigation and presumably at rates equivalent to those they would otherwise have charged to fee-paying clients.[9] Finally, the decisions offer no reasoned basis for distinguishing this contingent-fee case from any other such case or for the award of 25%, as opposed to some other percentage.

---

[8] In contrast to the *ad hoc* approach to risk enhancement for work at the trial level, the Second Circuit denied an unopposed motion for risk enhancement for the appeal, stating that "[t]he 'risk' involved in defending an appeal is not significant and, in the circumstances of this case, calls for no enhancement to the 'lodestar' amount." *Dague* Cert. Pet. App. 39a. This across-the-board approach to defending appeals, which contradicts what every appellate lawyer knows — that the risks of defending an appeal vary greatly — also illustrates the difficulties courts have in making sound determinations concerning risk enhancement.

[9] The preclusion-of-other-employment determination apparently was based on an affidavit by one of plaintiffs' counsel that merely stated that he and his firm previously had limited their practice "to representing fee-paying clients, because of the risk associated with the representation of . . . plaintiffs on a contingency fee basis" and "[t]hus, most of the hours spent on this matter would have been spent representing other

[Footnote continued on next page]

Even assuming that the lower courts in *Dague* had focused solely on risk in determining the propriety of a risk enhancement, the evidence that an enhancement was necessary to ensure that persons with meritorious claims could secure counsel without substantial difficulties was wholly lacking. The *Dague* affidavits are utterly insufficient under *Triplett* to establish that an award limited to the lodestar would cause persons with meritorious claims substantial difficulties in finding counsel, or that a 25% risk enhancement is necessary to ensure that this client, and others with meritorious claims, are able to secure counsel without substantial difficulty.

B. *McKenzie & King.*

The panel decisions in *McKenzie* and *King* established an extraordinary rule on risk enhancements applicable to all litigation brought under most federal fee-shifting statutes in the District of Columbia: whenever a defendant does not prevail in such a case, it must pay a 100% enhancement of the lodestar fee award to the extent that the case was taken by plaintiff's counsel on a contingent-fee basis. App. 58A. A 100% enhancement was authorized irrespective of whether plaintiff's counsel is a not-for-profit legal services organization whose *raison d'etre* is to bring suits without charging a fee; a large law firm engaging in "*pro bono*" litigation; or a sole practitioner or small firm willing to take a case on a contingent-fee basis without any assurance of a risk enhancement. See App. 58A; *McKenzie v. Kennickell, supra*, 875 F.2d at 331-32.

[Footnote continued from previous page]
clients who would pay our hourly rates on a monthly basis." Bland Aff. ¶ 9. Plaintiffs' counsel did not state, however, that he or his firm had turned away fee-paying clients as a result of their representation of petitioners. Even if he or his firm had done so, however, this certainly does not prove that a risk enhancement was necessary to persuade them to take the contingent-fee case.

In *McKenzie*, a panel of the D.C. Circuit relied on Justice O'Connor's opinion in *Delaware Valley II* to reject a challenge by the United States to a 50% risk enhancement in a Title VII action taken on a contingent-fee basis. The court upheld the award even though counsel in *McKenzie* were two not-for-profit legal services organizations and a major District of Columbia law firm, which had made clear that it would have represented the claimants "even if it believed that no enhancement to the lodestar fee would be available." 875 F.2d at 338. In its opinion, the panel also stated, based on "more than 20" attorney affidavits (*id.* at 336), that a 100% risk enhancement appeared to be the rate demanded by counsel in the relevant market, which it defined as "all contingency claims in the District of Columbia, particularly other types of complex federal litigation . . .." *Id.* at 334.

In *King*, also a Title VII action, a panel of the D.C. Circuit ordered a 100% enhancement based on *McKenzie*, and on: (1) affidavits by a handful of Title VII attorneys stating that they would not accept a case on a contingent-fee basis unless they could be assured of a 100% enhancement if they prevailed; and (2) an assumption that a 100% enhancement is necessary to ensure that attorneys take cases for which there is at least a 50% chance of prevailing. App. 56A-57A.[10]

The court ordered a 100% enhancement even though Ms. King had no difficulty finding counsel, Robert A. Adler, to represent her on a contingent-fee basis in March, 1983, when risk enhancements were few in number and small in amount. App. 4A, 50A. Indeed, Ms. King contacted Mr. Adler after he had just won a case on behalf of one of her colleagues for which he had received a risk enhancement of only 10%. App. 4A-5A. Furthermore, the panel awarded 100% even though,

[10] The affidavits are described in various places in the panel and *en banc* decisions in *King*. See App. 6A-7A, 15A-16A, 39A-41A, 44A, 53A, 56A, 59A, 64A. They have been filed with this Court in support of the petition for a writ of certiorari in *King*, and are also discussed in *King* Cert. Pet. 8-13.

before *Delaware Valley II*, Mr. Adler twice sought only a 35% risk enhancement, and the trial court had preliminarily ruled that 15% would be proper should this Court authorize risk enhancements in *Delaware Valley II*. App. 5A. The panel ordered 100%, moreover, even though the trial court had awarded 50% and also purported to follow Justice O'Connor's opinion in *Delaware Valley II*. See App. 5A-6A, 53A.

The risk enhancements granted in *Dague*, *McKenzie*, and *King* illustrate the considerable evidentiary and legal difficulties facing courts in attempting to formulate sensible rules to govern these issues. Thus, both the Second Circuit and the D.C. Circuit relied on attorney affidavits to demonstrate need although such evidence is insufficient as a matter of law. Furthermore, these affidavits are contradicted by the undeniable fact that attorneys take contingent-fee cases pursuant to fee-shifting legislation, as plaintiffs' counsel did in *Dague*, *McKenzie*, and *King*, without an assurance of receiving a premium for risk.

In addition, in interpreting *Delaware Valley II*, the courts have come up with very different approaches. Insofar as entitlement to risk enhancement is concerned, the Second Circuit purported to adopt an *ad hoc* approach but did not adequately explain why *Dague* differs from any other contingent-fee case. The panels in *McKenzie* and *King*, in turn, took an across-the-board approach purporting to be based on an analysis of the market but which, in fact, ignored variations in the market. The inadequacy of these attempts to measure the market is demonstrated by the disparity between the 25% enhancement granted in *Dague*, and the 100% authorized by the panels in *McKenzie* and *King*, as well as the disparity between the 100% enhancement authorized by those panels and the 50% granted by the trial court in *King*, a disparity that arose even though the trial court purported to apply the test applied by the panels in *McKenzie* and *King*.

III. RULES GOVERNING AN AWARD OF FEES TO COMPENSATE COUNSEL FOR RISK OF LOSS ARE POLITICAL JUDGMENTS TO INTERVENE IN THE MARKET WHICH SHOULD BE MADE BY CONGRESS.

Dague and the now-abandoned approach of the D.C. Circuit demonstrate that the propriety of any award of fees in order to compensate counsel for risk of loss is a political judgment to intervene in the market which should be made by Congress. It is not a judgment that this Court, or any court, can make.

As Judge Williams stated, in commenting on the 100% risk enhancement adopted in *McKenzie* and *King*,

> For when we look beneath the veneer of market analysis, the allowance of a 100% enhancement is clearly legislative — making the policy judgment that it is suitable to allow use of enhanced contingent fee-shifting for cases with a 50-50 chance of success or better. I know of no basis on which a court would be competent to set that level — or any other.

App. 65A.[11] Furthermore, Judge Williams also commented on the fact that not until *Delaware Valley II* was announced, did Mr. Adler request a risk enhancement of 100%. Judge Williams concluded: " . . . I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa." App. 64A. *Accord* App. 18A

[11] The court did not, in fact, undertake to determine whether Ms. King's chance of prevailing was at least 50%. Had the court done so, the evidence suggests that Ms. King may not have overcome that hurdle. Thus, as the *en banc* court in *King* observed, only five of the numerous attorney affidavits filed in the case addressed the issue of Ms. King's ability to secure counsel. Two of them "described the weakness and difficulty of her case as the principal reason the affiants would have been unwilling to assume representation," and one stated that his firm might have represented her *if* she had had an " 'exceptionally strong claim.' " App. 15A n.4.

Judge Williams is correct Whether to grant a risk enhancement, to whom, in what circumstances, and in what amount, are judgments that should be made by Congress. The fundamental policy decisions that must be made are how much litigation under federal fee-shifting statutes should be encouraged, and how the costs of this litigation should be allocated. These decisions necessarily rest not only on an understanding of what are commonly regarded as legislative facts but also on a balancing of competing interests not ordinarily encompassed in the judicial function.

Thus, for example, Congress may well consider the following questions in fashioning a law governing risk enhancement:

1. How many cases are successfully brought under federal fee-shifting legislation? If plaintiffs prevail in fewer than 50% of these cases, is it sound policy to provide an added incentive to attorneys to bring what necessarily will be even riskier cases than those already brought, or does public policy favor a level of incentive to ensure that each and every meritorious case is brought even though that level may result in 25 nonmeritorious claims being brought for each successful claim?

2. Should a risk enhancement be granted to not-for-profit legal organizations, which are in the business of bringing cases without fees to their clients, which already are being awarded lodestar fees at market rates, and which pay no income taxes? Should a risk enhancement be granted to attorneys whose market rates exceed those of the median private attorney in a market? Should a risk enhancement be given to attorneys, such as those in *McKenzie*, who agree to bring cases as part of a law-firm *pro bono* program without regard to risk enhancement?

3. Should a risk enhancement be automatically available to prevailing plaintiffs against government entities or should such plaintiffs be entitled to such an award only if the government's position was not substantially justified?

4. How does one set an appropriate level of risk enhancement? Do cases in which plaintiffs prevail take as much time on average as cases in which plaintiffs lose, even though plaintiffs must usually go the "full route" to win but may lose on a motion to dismiss or for summary judgment? Should the same level of enhancement be granted to all attorneys who are entitled to risk enhancement, and if not, who should receive greater risk enhancement?

These policy judgments, and more, must necessarily be made by this Court if it is to approve risk enhancements under federal fee-shifting legislation. As the litigation following *Delaware II* indicates, moreover, these judgments cannot be made in the expectation that what is being done reflects the market. Instead, any court-imposed risk enhancement constitutes an intervention in the market that will yield endless litigation.

CONCLUSION

This Court should reverse the judgment of the Second Circuit on the ground that risk enhancements are not permitted under the typical fee-shifting statute.

Respectfully submitted,

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY,
Assistant Corporation Counsel
Counsel of Record

Counsel for the District of Columbia
Room 305, District Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* February 27, 1991

Decided December 13, 1991

No. 89-7027

MABEL A. KING,
APPELLANT

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*

No. 89-7028

MABEL A. KING

v.

JAMES F. PALMER, DIRECTOR,
D.C. DEPARTMENT OF CORRECTIONS, *et al.*,
APPELLANTS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 83-1980)

Roger E. Warin, with whom *Bryan T. Veis* was on the brief, for appellant in 89-7027 and appellee in 89-7028. *Robert M. Adler* and *Joel P. Bennett* also entered appearances for appellants.

Donna M. Murasky, Assistant Corporation Counsel, with whom *Herbert O. Reid, Sr.*, Corporation Counsel, *John Payton,* Acting Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel, were on the brief, for appellees in 89-7027 and appellants in 89-7028. *Susan S. McDonald,* Assistant Corporation Counsel, also entered an appearance for appellees in 89-7027 and appellants in 89-7028.

Michael J. Ryan, Assistant United States Attorney, with whom *Stuart M. Gerson,* Assistant Attorney General, *Jay B. Stephens,* United States Attorney, *John Oliver Birch* and *R. Craig Lawrence,* Assistant United States Attorneys, were on the brief, for *amicus curiae* the United States of America in 89-7027 and 89-7028 urging reversal.

John J. Curtin, Jr., Rex E. Lee, Carter G. Phillips, and *Joseph R. Guerra* were on the brief for *amicus curiae* The American Bar Association in 89-7027 and 89-7028 urging that the panel's decision be reinstated without modification.

Daniel B. Edelman, Barry Goldstein, and *Mari Mayeda* were on the brief for *amici curiae* Joel P. Bennett, et al. in 89-7027 and 89-7028 urging that the panel's decision be reinstated without modification.

Blair G. Brown, Brenda V. Smith, and *Richard S. Seligman* were on the brief for *amicus curiae* the District of Columbia Bar in 89-7027 and 89-7028 urging that the panel's decision be reinstated.

Charles Stephen Ralston for NAACP Legal Defense Fund and Educational Fund; *E. Richard Larson* for Mexican American Legal Defense and Educational Fund; *Joseph M. Sellers* for Washington Lawyers' Committee for Civil Rights under Law; *Gregory O'Duden, Elaine Kaplan,* and *Timothy Hannapel* for National Treasury Employees Union; and *Paul M. Smith* for Washington Council of Lawyers, were on the joint brief for *amici curiae* in 89-7027 and 89-7028 urging that the panel's opinion be reinstated.

Daniel J. Popeo entered an appearance for *amicus curiae* The Washington Legal Foundation and the Allied Educational Foundation in 89-7027 and 89-7028 urging reversal.

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, THOMAS,* HENDERSON, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by SILBERMAN, *Circuit Judge,* in which BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges,* concur.

Dissenting opinion filed by EDWARDS, *Circuit Judge,* with whom MIKVA, *Chief Judge,* WALD and RUTH B. GINSBURG, *Circuit Judges,* join.

SILBERMAN, *Circuit Judge,* in which BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges,* concur: This case concerns the circumstances in which a court making an award of reasonable attorney's fees under federal fee-shifting statutes may augment the lodestar with a contingency enhancement designed to compensate the prevailing party's attorney for the risk of losing the case. The panel opinion in this case, *King v. Palmer,* 906 F.2d 762 (D.C. Cir. 1990), reviewed a district court award of attorney's fees and costs made to the plaintiff, Mabel King, pursuant to the fee-shifting

---

*Shortly after oral argument, Judge (now Justice) Thomas recused himself and has not participated in this decision.

provisions of Title VII. *See* 42 U.S.C. §§ 2000e-5(k), 2000e-16(d).[1] The panel rejected the District of Columbia's contention that no enhancement for the risk of nonpayment was proper but set aside the district court's award of an enhancement of 50% of attorney's fees subject to contingency, holding instead that Ms. King was entitled to a full 100% enhancement of those fees, relying on this court's decision in *McKenzie v. Kennickell,* 875 F.2d 330 (D.C. Cir. 1989). On September 12, 1990, we granted the District of Columbia's petition suggesting rehearing *en banc* to reconsider the holding on contingency enhancements in *McKenzie.* Having reviewed the issue *en banc,* we overrule *McKenzie* and reverse the award of a contingency enhancement to Ms. King.

I.

Mabel King brought a gender discrimination claim against her employer, the District of Columbia, and ultimately received an award of back pay and retroactive promotion. *See King v. Palmer,* 778 F.2d 878, 882 n.7 (D.C. Cir. 1985), *on remand,* Civ. No. 83-1980, Mem. at 1-5 (D.D.C. June 11, 1986). The history of the substantive litigation underlying the dispute over attorney's fees is summarized in the panel opinion. *See King,* 906 F.2d at 764.

Ms. King experienced no difficulty in securing an attorney. She was represented throughout the litigation by the first attorney she contacted, Robert Adler, who took the case on a partial contingency basis. Ms. King contacted Mr. Adler as a result of his successful representation of

[1] 42 U.S.C. § 2000e-5(k) provides in pertinent part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

Section 2000e-16(d) extends the provisions of § 2000e-5(k) to actions by employees of the District of Columbia. Congress has made clear that it intends the courts to resolve the policy questions inherent in determining what is "reasonable." *See* H.R. REP. No. 1558, 94th Cong., 2d Sess. 8 (1976).

a colleague of hers in another Title VII case, for which he had received a 10% contingency enhancement. Ms. King and Mr. Adler agreed that she would be responsible for litigation costs and expenses, as well as for fees of up to $5000, and that she would receive any award of damages, while Mr. Adler would receive any statutory attorney's fees that might be awarded, should Ms. King prevail. *See id.*

Mr. Adler averred that he took the case expecting that a contingency enhancement would be available. In his applications for attorney's fees following Ms. King's success on the merits, Mr. Adler twice requested a 35% fee bonus to compensate him for the risk of nonpayment he had borne during the litigation, but the district court held this request in abeyance pending the Supreme Court's decision concerning the availability of contingency enhancements in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 483 U.S. 711 (1987) (*Delaware Valley II*). In the interim, the district court awarded a lodestar fee totaling $232,707.62, which comprised the reasonable number of hours Mr. Adler spent on the case multiplied by a reasonable hourly rate, and noted that a "15 [percent] bonus for the risk of not prevailing would . . . be appropriate in the event that such an award is authorized by the Supreme Court." *King v. Palmer,* Civ. No. 83-1980, Rev. Mem. at 13 (D.D.C. June 10, 1987) (*Mem. Op. I*).

After the Court issued its fragmented decision in *Delaware Valley II,* Mr. Adler reapplied for a contingency enhancement, increasing his request to 100%. Reading Justice O'Connor's concurrence in *Delaware Valley II* as controlling the availability and degree of contingency enhancement, the district court held that the plaintiff must establish how the market compensates for contingent cases on a class-wide basis and then show that without such enhancement she would have had substantial difficulty attracting competent counsel to her case. *See King v. Palmer,* Civ. No. 83-1980-LFO, Mem. at 2 (D.D.C. Sept. 20, 1988) (*Mem. Op. II*). In the district court's view,

Ms. King met these requirements by introducing affidavits from a number of local attorneys experienced in Title VII work asserting that they would not accept fee-shifting cases where fees were available only if the case was won, absent the prospect of contingency enhancements. *See id.* at 3. Since Ms. King had agreed to pay all costs and expenses and the first $5000 of fees, however, the district court found that Mr. Adler's representation of her was only partially contingent and awarded a 50% enhancement instead of the 100% requested, on the authority of an earlier district court opinion in *Palmer v. Schultz,* 679 F. Supp. 68 (D.D.C. 1988), *appeal dismissed,* No. 88-5108 (D.C. Cir. 1988). *See Mem. Op. II* at 3-4. Both parties appealed.

The panel, following our previous opinion in *McKenzie v. Kennickell,* 875 F.2d 330 (D.C. Cir. 1989), affirmed the district court's award of a contingency enhancement but increased it from 50% of the lodestar to 100%. *McKenzie* established a regime in which contingency enhancements would be routinely available in statutory fee-shifting cases. In reaching this result, the *McKenzie* panel treated Justice O'Connor's concurring opinion in *Delaware Valley II* as controlling and explicitly applied her admonition that "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment) (quoting plurality opinion at 731). The *McKenzie* majority described the inquiry to be conducted under this test as "counterfactual," meaning that plaintiffs "need not show that [they] *actually* experienced difficulty in obtaining representation," but merely that, "absent a contingency enhancement, plaintiffs *would have* encountered substantial difficulties in finding counsel ... [at the time] they commenced their lawsuit." *McKenzie,* 875 F.2d at 337 (first emphasis added, second in original). Thus, the majority concluded that a prevailing plaintiff under the

typical fee shifting-statute could gain a contingency enhancement by producing affidavits from lawyers in the District of Columbia stating that those lawyers would not *normally* take a case on contingency unless they were paid more than their normal hourly fees if they won. Indeed, according to the majority, it was entirely irrelevant whether counsel in the case had been "attracted by the possibility of a contingency enhancement"; the panel dismissed as beside the point the fact that one of the lawyers who took the case, the head of the *pro bono* section of a major Washington law firm, candidly stated that his firm would have taken the case even without the prospect of a contingency enhancement. *Id.* at 338. The majority reasoned that were it to deny a contingency enhancement on an "actual difficulty" basis, it would simply encourage a "charade" in which "public interest lawyers would accept a case only after announcing loudly that they were doing so on the assumption of a contingency enhancement." *Id.* at 337-38. In short, under the *McKenzie* holding, even a plaintiff who easily found counsel and whose counsel presumably expected no contingency bonus could satisfy the "substantial difficulties" test.

Judge Buckley, dissenting on this issue, thought the *McKenzie* majority misread *Delaware Valley II.* He pointed out that "Justice O'Connor joined the plurality in requiring proof that *the prevailing party* 'would have faced substantial difficulties' in obtaining competent counsel ... absent an upward fee adjustment for contingency risks." *Id.* at 340-41 (Buckley, J., concurring in part and dissenting in part) (quoting *Delaware Valley II,* 483 U.S. at 733) (emphasis in original). That meant, according to Judge Buckley, that we were required to pursue an "individualized approach" in which evidence of *actual* difficulties would be extremely important. *Id.* at 341.

> Because the record establishes that McKenzie and his fellow plaintiffs had *in fact* located qualified lawyers willing to represent them in Washington, D.C. in the early 1970's, I conclude that under *Delaware Valley II these fee applicants have failed to prove that*

> *the prevailing party "would have faced substantial difficulties"* in securing competent attorneys absent the incentive of an enhanced fee.

Id. (emphasis added).

In accordance with *McKenzie*, the panel in this case thought the failure of the district court to make a specific finding that Ms. King would have faced substantial difficulties in obtaining counsel without a risk enhancement was of no real significance. *See King*, 906 F.2d at 768. The district court had instead relied on Ms. King's attorney affidavits and on a case in which a different district judge had made a blanket finding "that attorneys in the District would not accept contingent cases without some risk enhancement." *Id.* (citing *Mem. Op. II* at 2, 4 (citing *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988), *appeal dismissed*, No. 88-5108 (D.C. Cir. 1988))). The panel held that the cross-citation to the other district judge's finding in conjunction with the affidavits filed in the case was sufficient to satisfy *McKenzie*'s reading of Justice O'Connor's opinion.

We decided to rehear the case *en banc* in order to reconsider the interpretation of *Delaware Valley II* that the panel in *McKenzie* adopted. It is our view that the approach followed by the majority in *McKenzie* is, as Judge Buckley argued, a misreading of Justice O'Connor's concurring opinion. Moreover, we do not think that Justice O'Connor's concurring opinion in *Delaware Valley II* controls the issue of the circumstances under which contingency enhancements are permitted. We conclude that the fragmented decision in *Delaware Valley II* provides no test for determining the availability, much less the calculation, of contingency enhancements under fee-shifting statutes and that we are therefore obliged to continue the search for the most sensible rule to govern contingency enhancements. The rule we adopt is that of the *Delaware Valley II* plurality: a reasonable lodestar fee awarded under federal fee-shifting statutes may not be enhanced to compensate a prevailing party for his initial risk of loss.

II.

A.

Delaware Valley II has given rise to a spate of circuit court opinions that attempt—with varying degrees of confidence—to interpret the Supreme Court's position. *See, e.g., Rode v. Dellarciprete*, 892 F.2d 1177, 1184-85 (3d Cir. 1990); *Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451 (3d Cir. 1988); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 379-82 (3d Cir. 1987); *Craig v. Secretary, Dep't of Health and Human Servs.*, 864 F.2d 324, 327-28 (4th Cir. 1989); *Spell v. McDaniel*, 824 F.2d 1380, 1403-05 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *Leroy v. City of Houston*, 831 F.2d 576, 583-84 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988); *Skelton v. General Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988); *Hendrickson v. Branstad*, 934 F.2d 158, 162-63 (8th Cir. 1991); *D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1384 (9th Cir. 1990); *Fadhl v. City of San Francisco*, 859 F.2d 649, 650-51 (9th Cir. 1988) (per curiam); *Smith v. Freeman*, 921 F.2d 1120, 1122-23 (10th Cir. 1990); *Wulf v. City of Wichita*, 883 F.2d 842, 876 (10th Cir. 1989); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988). We, like our sister courts of appeal, have struggled to take from the case a rule of law that defines the circumstances in which contingency enhancements may be awarded to the lawyers who represent prevailing plaintiffs under the myriad of federal fee-shifting statutes. *See McKenzie v. Kennickell*, 875 F.2d 330, 332-38 (D.C. Cir. 1989); *id.* at 340-43 (Buckley, J., dissenting); *Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272-73 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988); *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 53 n.6 (D.C. Cir. 1987), *vacated on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988) (en banc).

The Supreme Court's decisions on attorney's fees prior to *Delaware Valley II* had established the lodestar—a

measure of fees defined by the number of hours reasonably expended on a case multiplied by a reasonable market rate per hour—as the presumptively reasonable award, steadily subsuming most other factors into that single calculation. *See Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983); *Blum v. Stenson,* 465 U.S. 886, 897-902 (1984); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 564-66 (1986) (*Delaware Valley I*). Twice, however, the Supreme Court had specifically reserved the question whether the lodestar could ever be enhanced to reflect the risk of nonpayment assumed by an attorney accepting a case under a statute that authorized fees only to the prevailing party. *See Blum,* 465 U.S. at 901 n.17; *Delaware Valley I,* 478 U.S. at 568. *Delaware Valley II* attempted to resolve this issue.[2]

The judgment in *Delaware Valley II* reversed an award of a 100% contingency enhancement.[3] Justice White, writing for a plurality of four Justices, concluded in Part IV of his opinion that contingency enhancements under fee-shifting statutes are simply "impermissible." *Delaware Valley II,* 483 U.S. at 727 (plurality opinion). Nevertheless, the plurality went on in Part V to suggest that if contingency bonuses were to be made available at all, they

[2]We do not understand how, as the dissent suggests, the discrete question presented in this case—whether a contingency enhancement is properly included within an award of attorney's fees—can possibly be thought a matter for the discretion of the trial judge. If the overall reasonableness of a statutory attorney's fee award were always a matter for the trial judge's discretion, unguided by a legal structure, the Supreme Court certainly has wasted a good deal of time and effort attempting to develop uniform rules. *See Blanchard v. Bergeron,* 489 U.S. 87 (1989); *Delaware Valley II,* 483 U.S. 711 (1987); *Delaware Valley I,* 478 U.S. 546 (1986); *Blum,* 465 U.S. 886 (1984); *Hensley,* 461 U.S. 424 (1983).

[3]*Delaware Valley II* interpreted the fee-shifting provision of the Clean Air Act, 42 U.S.C. § 7604(d). However, the Court has said that its standards for determining "reasonable" fees apply to all federal statutes awarding "reasonable" attorney's fees to a "prevailing party," including Title VII. *See Hensley,* 461 U.S. at 433 n.7.

"should be reserved for exceptional cases." *Id.* at 728. Four Justices in dissent would have allowed a contingency enhancement in any case in which "an attorney and client have been unable to mitigate the risk of nonpayment," *id.* at 749 (Blackmun, J., dissenting), as well as "additional enhancement" in those cases posing great "'legal' risks." *Id.* at 751. Under the dissent's test, contingency enhancements would be "appropriate in most circumstances." *Id.* at 3741.

Justice O'Connor concurred in part and concurred in the judgment reversing the award. She agreed with the dissenters that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee." *Id.* at 731 (O'Connor, J., concurring in part and concurring in the judgment). But she joined in the plurality's judgment that the record before the Court did not justify a contingency enhancement. *See id.* at 734. She also agreed with the plurality that no enhancement could be awarded for the "legal" risks peculiar to the specific case. *See id.* at 731, 734. Finally, Justice O'Connor agreed with the statement in Part V of the plurality opinion "that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* at 733 (quoting plurality opinion at 731).

B.

In our prior opinions interpreting *Delaware Valley II,* we, like other circuit courts, have assumed that Justice O'Connor's concurrence controls. *See McKenzie v. Kennickell,* 875 F.2d 330, 332-38 (D.C. Cir. 1989); *id.* at 340-43 (Buckley, J., dissenting); *Weisberg v. U.S. Dep't of Justice,* 848 F.2d 1265, 1272-73 (D.C. Cir. 1988); *Thompson v. Kennickell,* 836 F.2d 616, 621 (D.C. Cir. 1988); *Save Our Cumberland Mountains, Inc. v. Hodel,* 826 F.2d 43, 53 n.6 (D.C. Cir. 1987), *vacated on other grounds,* 857 F.2d 1516 (D.C. Cir. 1988) (en banc). But we have not focused on the

fact that there are two analytically distinct questions involved in awarding a contingency enhancement. First, a court must decide whether an enhancement is available at all. Then, assuming an enhancement is warranted, the court must calculate its amount. Virtually all of Justice O'Connor's relatively brief opinion deals with the second question. But the question of *availability* of enhancements logically precedes the question of their *calculation*.

To ascertain when contingency enhancements should be made available under *Delaware Valley II*, we have looked for some common ground between Justice O'Connor's concurrence and the plurality opinion. We have had little difficulty placing a *label* on that common ground, since Justice O'Connor expressly joined the plurality's statement in Part V that enhancements should be available only when a plaintiff would have faced "substantial difficulties" in attracting counsel to his case without the prospect of an enhancement. However, we and the other courts of appeals have had considerable trouble determining the *content* of that "substantial difficulties" label—that is, determining just how "substantial" the "difficulties" in attracting counsel have to be, and how they must be proven.

In this search for content, several of our sister circuits have read Justice O'Connor's concurrence as implicitly agreeing with the plurality's statement, *Delaware Valley II*, 483 U.S. at 727 (plurality opinion), that contingency bonuses should be available only in "exceptional cases." *See, e.g., Student Pub. Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1451-52 (3d Cir. 1988) ("[C]ontingency multipliers should be granted only rarely."); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n the rare case enhancement may be appropriate . . . ."). Appellant presses this position upon us here. And in *Thompson v. Kennickell*, we made a similar suggestion, describing *Delaware Valley II* in Gilbert and Sullivan terms: "What, never? No, never!" for the plurality, and "What, *never*? Hardly ever!" for Justice O'Connor. *Thompson*, 836 F.2d at 621 (emphasis in original).

To be sure, Justice O'Connor does not say at any point that she disagrees with the plurality's "exceptional cases" position. And she does endorse the plurality's view that the lodestar is a presumptively adequate fee. *See Delaware Valley II*, 483 U.S. at 733-34 (O'Connor, J., concurring in part and concurring in the judgment). Moreover, Justice O'Connor joined the reversal of the award of a contingency enhancement *without a remand*, notwithstanding the dissenters' powerful argument that the applicant should be given an opportunity to develop the record to meet the Supreme Court's standard. *See id.* at 754-55 (Blackmun, J., dissenting); *cf. Thompson*, 836 F.2d at 621 (remanding for application of *Delaware Valley II*). This at least suggests that Justice O'Connor believed that contingency enhancements should be available only in those presumably rare situations in which the need was readily apparent. Still, she did not join Part V of the plurality opinion, so we cannot be sure that she accepted the "exceptional cases" limitation.

There is only one point concerning the availability of contingency enhancements that a fair reading of Justice O'Connor's concurrence clearly supports. This point is that evidence of *actual* difficulties is highly probative of the "substantial difficulties" *Delaware Valley II* describes. In adopting the plurality's "substantial difficulties" test, Justice O'Connor quotes from Part V of the plurality opinion. The passage she quotes concludes with a footnote that we presume Justice O'Connor adopted along with the textual language she cited. The footnote states: " 'an attorney's fee award should be only as large as necessary to attract competent counsel,' and '*one relevant factor bearing on high-risk is whether other counsel had declined to take the case because there was little or no prospect of earning a fee.*' " *Id.* at 731 n.12 (plurality opinion) (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)) (emphasis added). And, as Judge Buckley noted in *McKenzie*, "Justice O'Connor joined the plurality in requiring proof that *the prevailing party* 'would have faced substantial difficulties' obtaining competent counsel 'in

the relevant market,' absent an upward fee adjustment for contingency risks." *McKenzie,* 875 F.2d at 340-41 (Buckley, J., concurring in part and dissenting in part) (quoting *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment)) (emphasis in original). We thus believe that five Justices envisioned a particularized factual inquiry into the plaintiff's *actual* difficulties in retaining counsel—the kind of inquiry that Judge Buckley thought necessary but the majority in *McKenzie* eschewed. *But see Morris v. American Nat'l Can Corp.,* Nos. 90-1235, 90-2289, 1991 WL 15315, *5 (8th Cir. Aug. 14, 1991) (stating no actual difficulties need be shown) (citing *McKenzie,* 875 F.2d at 337).

This is, we recognize, a hard standard to meet. Indeed, if evidence that other counsel actually refused the case is only "one relevant factor" in determining whether the plaintiff would have had "substantial difficulties" in obtaining counsel without a risk enhancement—a factor insufficient by itself to justify awarding an enhancement —the plaintiff's burden in producing sufficient evidence to meet the test must be quite daunting. And it also follows that a plaintiff's failure to put on *any* evidence of actual difficulties in attracting counsel without extra compensation would severely undermine a claim for a contingency enhancement.

The district court here made no finding that Ms. King would have faced substantial difficulties in attracting counsel without a contingency bonus. Nor was there any evidence that Ms. King faced actual difficulties in securing representation. As it happened, Robert Adler was the first attorney the plaintiff contacted, and, although he later stated that he would not have accepted representation without the "definite possibility" of a contingency enhancement, his fee award in a previous case had been enhanced by only 10%. Given the uncertain state of the law at the time he took this case (which is not to say that it is particularly clear today) and his previous experience, the "definite possibility" to which he referred does not seem very weighty. In his engagement letter to Ms. King,

Mr. Adler referred only to charging his "hourly rates" and stated that he would "seek an award of attorneys' fees from the defendants *with respect to those amounts,* should we be the prevailing party." Joint Appendix (J.A.) at 73a (emphasis added). It does not seem to us that Mr. Adler's testimony goes very far to meet the plaintiff's burden under the "substantial difficulties" test.

Before the district court and again before us, Ms. King has also sought to rely on the affidavits of attorneys who were not approached by Ms. King and were never involved in the case.[4] These affidavits—some from Title VII practitioners, some from practitioners from other areas—contend that lawyers would not take cases on a non-fee-paying basis without contingency enhancements. We do not think that we can accept such evidence as meeting the substantial difficulties test. Without in any way denigrating the *bona fides* of these lawyers, we cannot blink the fact that they are obviously self-interested. We think it is indisputable that if such evidence were treated as determinative, or even weighty, the substantial difficulties test would be met so easily as to become a mere formality. The Supreme Court has itself recently disparaged such anecdotal evidence from attorneys unconnected with the case in the context of attorney's fees disputes. *See United States Dep't of Labor v. Triplett,* 110 S. Ct. 1428, 1433-34

---

[4]Of these numerous affidavits, only five addressed the facts of Ms. King's particular case or expressed any opinion at all about whether Ms. King herself would have faced substantial difficulties in attracting competent counsel absent the availability of a contingency enhancement. Two of these described the weakness and difficulty of her case as the principal reason the affiants would have been unwilling to assume representation. *See* J.A. at 112d (Cashdan); 173b (Fitzpatrick). Another attorney allowed that his firm would possibly have represented Ms. King if she had an "exceptionally strong claim." J.A. at 124b (Chuzi). The fourth admitted there was at least a possibility, although "remote," of finding *pro bono* representation for Ms. King. *See* J.A. at 214 (Lapidus). Only a single affidavit stated flatly that the affiant would not take Ms. King's case because of the unavailability of contingency enhancements. *See* J.A. at 177 (Gottfried).

(1990) (holding such evidence to be "blatantly insufficient" to raise a constitutional doubt about federal limits on attorney's fees, "even if entirely unrebutted").

Nor do we believe the few affidavits presented that expressed a view as to whether the affiant lawyer would or would not have taken Ms. King's case add much to her claim for an enhancement. Insofar as they seek to hypothesize whether the affiants would have taken her case, they focus (inevitably it seems to us) on the strength or weakness of her claim. *See supra* note 3. But in *Delaware Valley II,* it will be recalled, both the plurality and Justice O'Connor regarded that factor as inappropriate. *See Delaware Valley II,* 483 U.S. at 726 (plurality opinion); *id.* at 734 (O'Connor, J., concurring in part and concurring in the judgment).

In sum, even if we were to apply Justice O'Connor's concurrence as the holding of *Delaware Valley II,* we think Ms. King's evidence does not paint a picture of a situation where a contingency enhancement is necessary to "mak[e] it possible for poor clients with good claims to secure competent help." *Id.* at 730-31.

C.

Although we have determined that Ms. King failed to carry her burden under Justice O'Connor's opinion in *Delaware Valley II,* candor obliges us to concede that we are unable to set forth a conceptual framework that would govern further litigation on the subject of contingency enhancements. We have certainly suggested, in accordance with our understanding of the substantial difficulties test, that actual evidence that attorneys did refuse a case is of greater probative value than the hypothetical testimony of non-involved and self-interested lawyers. But we are sorely troubled by, and indeed we have no answer to, the *McKenzie* majority's argument that focusing on actual difficulties will encourage "a charade in which clients seeking representation under fee shifting statutes would be steered to several attorneys whose pre-arranged

role it would be to 'refuse' the case, knowing that such refusals were necessary to permit the eventual award of fees." *McKenzie,* 875 F.2d at 337. We think the *McKenzie* majority was also correct in suggesting that emphasizing the actual difficulties a plaintiff had in obtaining counsel will create perverse incentives by discouraging those very "reference services . . . that make it easier for litigants to find legal representation." *Id.*

To add to our quandary, even if we did have evidence that several lawyers had declined Ms. King's case, we think it would be impossible to separate out from their decision not to represent her the strength or weakness of her claim as it appeared to them at the time. After all, this is surely the principal reason a lawyer will turn down a case under a fee-shifting statute. *Delaware Valley II,* however, tells us unequivocally that the risk of loss in a particular case is not a factor that courts may look at in determining whether a contingency enhancement is appropriate. "[A] court should not award any enhancement based on 'legal' risks or risks peculiar to the case." *Delaware Valley II,* 483 U.S. at 734 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 726-27 (plurality opinion).[5] If the courts cannot do so directly, how can it be appropriate to do so vicariously through the eyes of lawyers who declined the case?

The more we struggle with this problem, the more we are convinced that it is virtually impossible to determine whether a given plaintiff would have had "substantial difficulties" in obtaining counsel without a contingency enhancement. The inquiry is quite artificial, because, by definition, the plaintiff stands before the court with coun-

---

[5]The dissent, nevertheless, would calculate the amount of contingency enhancement based on the degree of risk faced by the plaintiff's lawyer in *each case.* As the plurality in *Delaware Valley II* noted, that approach would provide incentives to bring the weakest cases to court, and it would put the district judge who had to make that determination in a difficult psychological posture. *See Delaware Valley II,* 483 U.S. at 722; *id.* at 725 (plurality opinion).

sel. And since counsel could not possibly know whether a risk enhancement was in the offing until a court decides the question years later, our inquiry is circular. As Judge Williams noted in his concurrence in the panel opinion in this case, whether a plaintiff *would have* faced substantial difficulties absent the possibility of a contingency enhancement is essentially unknowable when the most critical assumption necessary to make such a counterfactual judgment is itself the issue before the court. *See King*, 906 F.2d at 770 (Williams, J., concurring) ("I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa.").

As Judge Buckley correctly observed in *McKenzie*, if Justice O'Connor's opinion controls the holding of *Delaware Valley II*, we would be obliged to apply the "substantial difficulties" test, notwithstanding these analytical difficulties, "like it or not." *McKenzie*, 875 F.2d at 342 (Buckley, J., concurring in part and dissenting in part). But the difficulties we have described have prompted us to think harder about what the controlling principles of *Delaware Valley II* really are; specifically, we have reconsidered whether we have been correct in assuming that Justice O'Connor's concurring opinion governs the subject of contingency enhancements. We have regarded her concurrence as controlling largely in reliance on the Supreme Court's admonition in *Marks v. United States*, 430 U.S. 188 (1977), that when the Court issues fragmented opinions, the opinion of the Justices concurring in the judgment on the "'narrowest grounds'" should be regarded as the Court's holding. *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). But *Marks* is workable—one opinion can be meaningfully regarded as "narrower" than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), for example, the Court interpreted its earlier nine-way split in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). In *Furman*, the five Justices who supported the judgment that Georgia's death penalty statute was unconstitutional produced five separate opinions. Two Justices concluded that the death penalty was unconstitutional in all circumstances. *See id.* at 305-06 (Brennan, J., concurring); *id.* at 370-71 (Marshall, J., concurring). Three others found specific defects in the Georgia statute but declined to decide whether capital punishment might be constitutional under other circumstances. Of these, Justices Stewart and White felt that the Georgia death penalty was unconstitutional because it was applied in an arbitrary and capricious manner, *see id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring), while Justice Douglas stated that it was unconstitutional because it was "pregnant with discrimination," falling more harshly on minorities and the poor both because its application was discretionary rather than mandatory and because wealthy defendants could afford better counsel. *See id.* at 255-57 (Douglas, J., concurring).

In *Gregg*, the Court—in another fragmented opinion—treated the opinions of Justices Stewart and White as controlling. *See Gregg*, 428 U.S. at 169 n.15 (plurality opinion). Justices Marshall and Brennan, who believed the death penalty unconstitutional in all circumstances, surely agreed with Justices Stewart and White that it was unconstitutional when administered in an arbitrary and capricious manner. By the same token, Justice Douglas, who insisted that any discretion in the judge or jury to decide when to impose capital punishment rendered the arrangement unconstitutional, would certainly have subscribed to Justice Stewart's notion that the death penalty could not be administered constitutionally to "a capriciously selected random handful" of criminals. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). Selecting the opinions of Justices Stewart and White as the holding of *Furman* in *Gregg* was thus unproblematic.

Similarly, in *Marks* itself, the Court adopted as the governing definition of obscenity the position of the plurality from the earlier case of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts,* 383 U.S. 413 (1966) (*Fanny Hill*). In *Fanny Hill,* three separate views supported the judgment that the book was not obscene: the view expressed in the plurality opinion, which said that a book had to be "utterly without redeeming social value" to be considered obscene, *see id.* at 419 (opinion of Brennan and Fortas, JJ., and Warren, C.J.) (emphasis omitted); the view of Justice Stewart that only "hardcore" pornography could be banned as obscene, *see id.* at 421 (opinion of Stewart, J.); and the view of Justices Black and Douglas, who believed that obscenity could never be banned. *See id.* at 421 (opinion of Black, J.); *id.* at 433 (opinion of Douglas, J.). Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices: *Marks*' "narrowest grounds" approach yielded a logical result.[6]

When, however, one opinion supporting the judgment does not fit entirely within a broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.

The Court itself appears not to apply *Marks* in cases of this type. To take one example, in *Coolidge v. New*

[6]Justice Stewart's "hardcore" test, though it was also a logical subset of Justice Black and Douglas' opinion, would only have spoken for three Justices and could therefore not have been the controlling rationale.

Hampshire, 403 U.S. 443 (1971), a plurality of four Justices held that only when evidence was discovered "inadvertently" could it be seized pursuant to the plain view exception to the Fourth Amendment's warrant requirement. *See id.* at 469 (plurality opinion). Four other Justices believed that inadvertence was not necessary for a valid seizure of evidence in plain view. *See id.* at 492 (Burger, C.J., concurring in part and dissenting in part); *id.* at 506 (Black, J., concurring in part and dissenting in part); *id.* at 510 (Blackmun, J., concurring in part and dissenting in part); *id.* at 516 (White, J., concurring in part and dissenting in part). Justice Harlan concurred in the judgment that the search in question was unconstitutional but provided no reasoning by which one could discern his position on the inadvertence requirement. *See id.* at 490 (Harlan, J., concurring in the judgment). The Court subsequently stated that the inadvertence requirement was "not a binding precedent" and was merely "the considered opinion of four Members of this Court" that should be "the point of reference for further discussion of the issue." *Texas v. Brown,* 460 U.S. 730, 737 (1983) (plurality opinion). The Court eventually disavowed the inadvertence requirement entirely. *See Horton v. California,* 110 S. Ct. 2301, 2308-10 (1990).

It seems to us that *Delaware Valley II* is one of the fragmented opinion cases that cannot be resolved satisfactorily by *Marks.* Unlike *Furman* or *Fanny Hill, Delaware Valley II* is not a case in which the concurrence posits a narrow test to which the plurality must necessarily agree as a logical consequence of its own, broader position. In other words, it is not a case in which there is an implicit majority of the Court. Rather, *Delaware Valley II* involves three distinct approaches to the issue of contingency enhancements in fee-shifting statutes, none of which enjoys the support of five Justices.

Superficially, to be sure, there is a common link between the plurality opinion and Justice O'Connor's concurrence; both Part V of the plurality opinion and Justice O'Connor seem to endorse the substantial difficulties test

we sought to apply earlier in this opinion. But the plurality quite clearly indicated in Part IV that it did not believe that contingency enhancements were ever available. *See Delaware Valley II,* 483 U.S. at 727 (plurality opinion). Therefore, Part V appears to have been composed not as an alternative holding but rather as a fallback position, an invitation, as it were, to Justice O'Connor to reach common ground. Since Justice O'Connor did not accept the plurality's invitation, explicitly declining to join Part V, the plurality's true position remains that expressed in Part IV.

Justice O'Connor does appear to accept the bare concept that contingency enhancements should not be awarded unless the plaintiff shows substantial difficulties, but it is far from clear, as we noted earlier, what content she would give to the "substantial difficulties" test the plurality articulates in Part V. Her concurrence does not contain enough independent reasoning on the question of availability to allow us to compare her position analytically to that of the plurality. In that sense, her opinion on that issue approaches Justice Harlan's in *Coolidge.*

Even if it were possible to determine from Justice O'Connor's opinion *when* to apply a contingency enhancement and to conclude that her views on that subject were somehow narrower than the plurality's, it is quite clear that one could not say in the *Marks* sense that her carefully explained view of *how* the contingency enhancement should be calculated is narrower than the plurality's answer to that question. The plurality in Part IV stated that if an upward adjustment for contingency risk were applied, the amount should be based on the "real risk-of-not-prevailing" in the case—but as a general rule should be "no more than one-third of the lodestar." *Id.* at 730. Justice O'Connor, on the other hand, takes a different approach altogether, one that does not vary with the riskiness of the individual case but rather is based on a class determination of the amount of contingency enhancement usually paid in the relevant market, with no explicit ceiling. *See id.* at 731-34 (O'Connor, J. concurring in part and

concurring in the judgment). We do not see how either approach can be thought "narrower" than the other; they are simply different.

To apply *Marks* to *Delaware Valley II,* we would have to conclude that Justice O'Connor's answers to both the "when" and the "how" questions were "narrower" than the plurality's in Part V. Without implicit agreement on both, it is simply impossible to regard the substantial difficulties test as controlling. Of course, as we have recognized, how one calculates a contingency enhancement could be thought to be a separate analytic issue from the question whether and under what circumstances a contingency enhancement is available. But as the panel opinion and other cases demonstrate, the two questions tend to run together. *See King,* 906 F.2d at 765-68; *McKenzie,* 875 F.2d at 334-37; *Student Pub. Interest Research Group v. AT & T Bell Laboratories,* 842 F.2d 1436, 1451 (3d Cir. 1988). It is very difficult to consider the circumstances under which a contingency enhancement is "necessary" to attract counsel without contemplating the amount of the enhancement; each part of the inquiry has inevitable ramifications for the other. This may be the reason Justice O'Connor's opinion focuses so heavily on the "how" question. Because her answer to that question is so clearly at odds with that of the plurality, however, we are left without a controlling opinion or a governing test for awarding contingency enhancements under *Delaware Valley II.*

The Third Circuit, taking a different approach, has reasoned that Justice O'Connor's opinion can be regarded as a subset of the dissent if not the plurality. As such, Justice O'Connor's concurrence would speak for a majority of the Court. *See id.* ("Because the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court."). The Third Circuit appears to apply the *Marks* methodology to reach this result, but it does not explicitly rely on *Marks. See id.* at 1451 n.16 (citing *Marks* as a "see also" in a footnote appended to the citation of a circuit opinion). This is understandable,

because *Marks* has never been so applied by the Supreme Court, and we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority. As the Court said in *Marks* itself, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by *those members who concurred in the judgments* on the narrowest grounds.'" *Marks,* 430 U.S. at 193 (quoting *Gregg,* 428 U.S. at 169 n.15 (opinion of Stewart, Powell, and Stevens, JJ.)).

To be sure, in *Vasquez v. Hillery,* 474 U.S. 254 (1986), the Supreme Court, in interpreting *Rose v. Mitchell,* 443 U.S. 545 (1979), emphasized that an opinion that combines shifting majorities in various portions is no less binding than would be an opinion in which the same Justices formed the majority for all the sections. *See Vasquez,* 474 U.S. at 261-62 n.4; *see also Arizona v. Fulminante,* 111 S. Ct. 1246 (1991) (employing two distinct majorities to arrive at a judgment, both of which therefore constitute binding law). That, however, is quite a different situation than the one that the *Marks* methodology addresses, where there is no explicit majority agreement on all the analytically necessary portions of a Supreme Court opinion. Under these latter circumstances, if the application of *Marks* will not yield a majority holding, nothing will.[7]

To say that *Delaware Valley II* provides no controlling legal holding is not to say that it has no binding impact on us. Because the Court's result was to deny a contin-

[7]In our view, even applying the Third Circuit's reasoning, we do not think Justice O'Connor's concurrence constitutes a controlling opinion in *Delaware Valley II.* For similar reasons to those we outlined in our discussion as to whether her opinion could be thought narrower than the plurality opinion, Justice O'Connor's thoughtful answer to the question of how to calculate a contingency enhancement should it be available cannot possibly be thought a subset of the dissent's approach to the same issue. She herself recognizes this. *See Delaware Valley II,* 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment).

gency enhancement without even a remand, we think we could not authorize the routine awarding of contingency enhancements of whatever size. *Cf. National Mut. Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (noting that the result is binding even when the Court fails to agree on reasoning). We furthermore believe, as this opinion and the dissent make clear, that there simply is no practical middle ground between providing enhancements routinely and not providing them at all. Keeping in mind that a majority of the Supreme Court clearly agrees that the question of attorney's fees must not turn into major litigation in itself, *see Delaware Valley II,* 483 U.S. at 722, we think the appropriate course is to hold that contingency enhancements will not be available in this Circuit.[8] We note that although other circuit courts have set forth various tests for awarding contingency enhancements under *Delaware Valley II,* most of the tests appear to be difficult, if not impossible, to meet in practice. *See, e.g., Student Pub. Interest Research Group v. AT & T Bell Laboratories,* 842 F.2d 1436, 1451-52 (3d Cir. 1988) ("[C]ontingency multipliers should be granted only rarely."); *Craig v. Secretary, Dep't of Health and Human Servs.,* 864 F.2d 324, 327 (4th Cir. 1989) (no contingency enhancement available "in the absence of exceptional circumstances"); *Leroy v. City of Houston,* 831 F.2d 576, 583 (5th Cir. 1987) (contingency enhancements should be "reserved for 'exceptional cases'" (citation omitted)); *Skelton v. General*

[8]The dissent's reliance on the legislative history of 42 U.S.C. § 1988—particularly citations to *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974)—comes too late. The Supreme Court has, on several occasions, indicated that it does not regard factors listed separately in *Johnson* as appropriate enhancements to the lodestar. *See Blum v. Stenson,* 465 U.S. 886, 898-99 (1984); *Delaware Valley I,* 478 U.S. 546, 564, 566 (1986). And the dissent's citation of *Blanchard v. Bergeron,* 489 U.S. 87 (1989), is also misplaced. There the Supreme Court was dealing with an entirely different issue—the question whether an actual, private contingency fee arrangement limited a statutory award, not whether a contingency factor should be added to the lodestar.

Motors Corp., 860 F.2d 250, 254 (7th Cir. 1988) (contingency enhancements available only if plaintiffs meet "stringent requirements"); *Hendrickson v. Branstad*, 934 F.2d 158, 162 (8th Cir. 1991) ("[E]nhancement is reserved for 'rare' and 'exceptional' cases ...."); *Smith v. Freeman*, 921 F.2d 1120, 1123 (10th Cir. 1990) (quoting plurality's view that "enhancement for the risk of nonpayment should be reserved for exceptional cases"); *Norman v. Housing Auth.*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("[I]n the rare case enhancement may be appropriate ...."). *But cf. D'Emanuele v. Montgomery Ward & Co.*, 904 F.2d 1379, 1383 (9th Cir. 1990) (implying that routine contingency enhancements might be justified).

We have done our best to apply *Delaware Valley II* but have been unable to derive a governing rule from the opinion. Considering our struggle to understand and apply *Delaware Valley II* as well as the difficulties our sister circuits have experienced, we urge the Supreme Court to clarify its position.

* * * *

For the foregoing reasons, we overrule *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), and those portions of our other previous opinions inconsistent with our current disposition, and reverse the contingency enhancement portion of the attorney's fees allowed to appellant.

It is so ordered.

EDWARDS, *Circuit Judge*, with whom MIKVA, *Chief Judge*, WALD and RUTH B. GINSBURG, *Circuit Judges*, join, *dissenting*: In deciding this appeal, we are constrained to apply a specific statutory provision, section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1988), under which the District Court has broad authority to assess the reasonableness of a fee request. In the absence of legal error, the trial judge's determination as to reasonableness may not be disturbed unless it is an *abuse of discretion*. Given this highly deferential standard of review, there is no legitimate basis whatsoever for this court to overturn the judgment of the trial judge on the facts of this case.

Furthermore, the majority's new rule, that contingency awards are never justified, is completely without foundation. Twelve other circuits have reviewed the question at hand, and not one other circuit has adopted a rule that completely bars contingency enhancements.

The plaintiff, Mable King, was awarded an attorney's fee pursuant to section 706(k), which reads, in pertinent part, as follows:

> In any action or proceeding under this subchapter the court, *in its discretion*, may allow the prevailing party ... *a reasonable attorney's fee* as part of the costs [of bringing the action] ....

42 U.S.C. § 2000e-5(k) (1988) (emphasis added). As may be seen from the clear terms of the statute, the "district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness." *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984). The Supreme Court has *emphasized* that it is entirely "appropriate" that the trial judge have broad authority in determining the amount of a fee award "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).[1]

---

[1] *See also Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) ("It is central to the awarding of attorney's fees ... that the district

In this case, the District Court awarded an attorney's fee that compensates Ms. King's counsel for the risk of having taken the case on a contingent-fee basis. In reaching its conclusion that a 50% enhancement over normal hourly rates was "reasonable" compensation in this case, the District Court properly looked to evidence of prevailing market practices to ensure that the fee award was roughly commensurable with what counsel could obtain on the open market. There is no doubt, given the language of the statute, that the District Court's judgment in this regard is to be reviewed under a highly deferential, abuse-of-discretion standard. *See Blum,* 465 U.S. at 896; *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 569 (1986) ("*Delaware Valley I*") (Blackmun, J., concurring in part and dissenting in part); *City of Riverside v. Rivera,* 477 U.S. 561, 586 (1986) (Powell, J., concurring in the judgment). Under this standard of review, we are not to substitute our judgment of what is "reasonable" for that of the District Court; rather, we are to review the trial court's judgment only to ensure that it is not founded upon an error of law or a clearly erroneous finding of fact and that there is some evidence in the record upon which the court "rationally could have based its decision." *Heat & Control, Inc. v. Hester Indus., Inc.,* 785 F.2d 1017, 1022 (Fed. Cir. 1986); *see also Founding Church of Scientology of Washington, D.C., Inc. v. Webster,* 802 F.2d 1448, 1457 (D.C. Cir. 1986) ("The abuse-of-discretion standard calls on the appellate department, in a spirit of humility occasioned by not having participated in what has gone before, not just to scrutinize

---

court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case.").

Although some of these precedents focus upon the parallel fee-shifting provision set out in the Civil Rights Attorney's Fee Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *codified at* 42 U.S.C. § 1988 (1988), Congress and the Supreme Court have made clear that the fee-shifting provisions of that statute and Title VII are to be interpreted alike. *See Hensley,* 461 U.S. at 433 n.7; S. REP. No. 1011, 94th Cong., 2d Sess. 4 (1976).

the conclusion but to examine with care and respect the process that led up to it."), *cert. denied,* 484 U.S. 871 (1987); *Gomez v. Chody,* 867 F.2d 395, 405 (7th Cir. 1989) (" 'To find an abuse of discretion, we must conclude that "no reasonable [person] ... could agree with the district court." ' ") (quoting *Mumford v. Bowen,* 814 F.2d 328, 329 (7th Cir. 1986)).

Notwithstanding the latitude vested by Congress in trial courts to craft "reasonable" fee awards, the District of Columbia ("Government") defendants in this case urge this court to substitute its judgment for that of the trial judge in overturning the award of fees. In following this suggestion, the majority seizes upon the "substantial difficulties" test found in *Pennsylvania v. Delaware Valley Citizens' Council for Clear Air,* 483 U.S. 711, 731 (1987) ("*Delaware Valley II*"); *id.* at 733 (O'Connor, J., concurring in part and concurring in the judgment), which purports to measure risk enhancement pursuant to prevailing "market" rates in the relevant legal community. The majority, however, turns the test on its head by converting it to a test whereby an individual plaintiff must establish that she personally encountered difficulty securing competent representation without the promise of a contingency enhancement. The problem with this result, however, is that it defies the premise upon which it is based. If there is a "substantial difficulties" requirement under section 706(k), it does *not* seek to determine whether a particular plaintiff "actually faced substantial difficulty in retaining counsel." *Morris v. American Nat'l Can Corp.,* 941 F.2d 710, 715 (8th Cir. 1991) (citing *McKenzie v. Kennickel,* 875 F.2d 330, 337-38 (D.C. Cir. 1989); *see* 875 F.2d at 338 ("Justice O'Connor's opinion instructs us to adopt a class-wide view of contingent cases; if the unavailability of risk enhancements would have caused plaintiffs to have experienced 'substantial difficulty' in locating counsel, then, notwithstanding the particular circumstances of their case, such an enhancement may be granted.")). Therefore, the trial judge surely did not abuse his discretion in failing to apply the majority's distorted construc-

tion of the so-called "substantial difficulties" test. There is no "actual difficulties" requirement under section 706(k), and this court has no authority to amend the statute to include such a restriction.

Just recently, in rejecting a claim for expert fees as a part of a claim for attorney's fees, the Supreme Court reminded us that we must enforce fee statutes as written. On this point, Justice Scalia, borrowing a well-known passage from an opinion by Justice Brandeis, said:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

West Va. Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991) (quoting *Iselin v. United States,* 270 U.S. 245, 250-51 (1926)). In first utilizing an actual difficulties gloss to section 706(k), and then completely barring contingency enhancements, the majority opinion in this case "transcends the judicial function." Because there is nothing in the statute or the relevant Supreme Court case law that would support the majority's conclusion, we dissent.

I.

By now, it should be beyond dispute that the fee-shifting provision of Title VII permits district courts to enhance time-based fee awards to take account of the fact that an attorney has taken a case on a contingent-fee basis. It is, of course, true that, in determining what is "a reasonable attorney's fee" in any given case, the trial judge normally begins by calculating the prevailing attorney's so-called "lodestar" fee. As the Supreme Court has explained:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an

> objective basis on which to make *an initial estimate* of the value of a lawyer's services.

Hensley, 461 U.S. at 433 (emphasis added). This calculation, however, is only a "starting point" and "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward . . . ." *Id.* at 434; *see also Blanchard v. Bergeron,* 489 U.S. 87, 94 (1989); *Blum,* 465 U.S. at 888 ("[a]djustments to that [lodestar] fee then may be made as necessary in the particular case").

Among these "other considerations," it appears quite certain that Congress intended that the courts would take into account whether a lawyer had taken a case on a fixed- or contingent-fee basis. This can be inferred from Congress' approving citation of a 1974 Fifth Circuit decision, *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), which included the contingent nature of payment among 12 factors that trial courts should consider in calculating fee awards. *See* S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976); H.R. REP. NO. 1558, 94th Cong., 2d Sess. 8-9 (1976); *see also Blum,* 465 U.S. at 902-03 (Brennan, J., concurring) (Congress' approval of *Johnson* and related cases makes it "clear . . . that Congress authorized district courts to award upward adjustments to compensate for the contingent nature of success"). "*Johnson*'s 'list of 12,'" the Supreme Court has often observed, "provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees . . . ." *Blanchard,* 489 U.S. at 93; *see also Hensley,* 461 U.S. at 429-30, 434 n.9 (looking to Fifth Circuit's *Johnson* opinion in determining congressional intent with regard to fee awards); *Blum,* 465 U.S. at 893-95 (same); *id.* at 902-03 (Brennan, J., concurring) (same).

Apart from these indications of congressional intent, the Supreme Court also has acknowledged the propriety of considering the uncertainty of payment in calculating a fee award. Five Justices undoubtedly agreed in *Delaware Valley II* that "Congress did not intend to fore-

close consideration of contingency in setting a reasonable fee under fee-shifting provisions" such as that found in Title VII. 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 739 (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) ("Congress envisioned that district courts would take the fact of contingency into account when calculating a reasonable attorney's fee"). Two years later, in *Blanchard,* the Court held that, while a plaintiff's contingent-fee contract with her attorney is by no means dispositive of a subsequent judicial assessment of "a reasonable attorney's fee" in a case, "[t]he *Johnson* contingency-fee factor *is* ... a factor." 489 U.S. at 93 (emphasis added).

Moreover, perhaps the one rule that has emerged more clearly than any other from the Supreme Court's pronouncements in this area is that court-ordered attorney's fees are to reflect prevailing market rates and practices. *See, e.g., Missouri v. Jenkins,* 491 U.S. 274, 283 (1989) ("Our cases have repeatedly stressed that attorney's fees awarded [by a court] ... are to be based on market rates for the services rendered."); *Blum,* 465 U.S. at 895 ("The statute and legislative history establish that 'reasonable fees' ... are to be calculated according to the prevailing market rates in the relevant community ...."); *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 754 (Blackmun, J., dissenting). In this way, court-ordered fees will track market forces, fulfilling the congressional purpose of ensuring that attorneys will be available to prosecute Title VII cases and vindicate the fundamental national policies embodied in that statute. *See Jenkins,* 491 U.S. at 283 n.6; *Blum,* 465 U.S. at 903-04 (Brennan, J., concurring); *Hensley,* 461 U.S. at 447 (Brennan, J., concurring in part and dissenting in part).

There should be no controversy in the observation that attorneys in the private legal-services market ordinarily demand somewhat greater compensation in exchange for taking a case on a contingent-fee basis. It appears indisputable that "[l]awyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid[ ] irrespective of whether they win or lose." *Blum,* 465 U.S. at 903 (Brennan, J., concurring); *see also* Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?,* 126 U. PA. L. REV. 281, 324-25 (1977) ("The experience of the marketplace indicates that lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk."). Thus, commentators and courts have long and widely agreed that, in assessing the fair market value of legal services, both inside and outside the court-ordered fee context, some enhancement is required to compensate for the attorney's assumption of risk in a contingent-fee case. *See, e.g., Copeland v. Marshall,* 641 F.2d 880, 892-93 (D.C. Cir. 1980) (*en banc*); *id.* at 927 (Wilkey, J., dissenting); *Evans v. Sheraton Park Hotel,* 503 F.2d 177, 188 (D.C. Cir. 1974) (adopting *Johnson*'s "list of 12"); 2 M. DERFNER & A. WOLF, COURT ORDERED ATTORNEY FEES ¶ 15.01[2][c], at 15-16 (rev. ed. 1990) ("Most courts realize that where payment of a fee is contingent on success an attorney should receive a larger overall fee than where payment is guaranteed regardless of outcome ....") (footnote omitted); *id.,* ¶ 16.04[4]; S. SPEISER, ATTORNEYS' FEES § 8:10, at 319 (1973) ("The fact that an attorney's employment is undertaken on a contingent basis is a proper factor to be considered in assessing a reasonable compensation for his services, the courts generally taking the view that a larger fee will be authorized where its payment depends upon the attorney's success than where he is to be paid whether or not his efforts are successful.") (footnote omitted); Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 YALE L.J. 473, 501 (1981); Berger, *supra,* at 324-26.

Furthermore, it is absolutely clear that the lodestar is not the sole measure of a reasonable attorney's fee. It is true that the Supreme Court has said that "many of the *Johnson* factors," such as " 'novelty [and] complexity of the

issues,' 'the special skill and experience of counsel,' the 'quality of representation,' and the 'results obtained' from the litigation[,] are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award," *see Delaware Valley I*, 478 U.S. at 565 (quoting *Blum*, 465 U.S. at 898-900); but, in making this observation, the Court has excluded the consideration of "enhancement of the lodestar[ ] based on the likelihood of success[ ] or . . . the risk of loss" from any presumption that the lodestar represents a reasonable fee, *id.* at 568.[2] Indeed, in *Delaware Valley I*, the Court reserved until *Delaware Valley II* the question of when and to what extent contingency enhancements might be awarded. As indicated earlier, a majority of the Court in *Delaware Valley II* agreed that contingency enhancements may be awarded as a part of a reasonable attorney's fee. In other words, a majority of the Court in *Delaware Valley II* declined to apply any "presumption" that the lodestar normally represents a reasonable fee so as to defeat claims of enhancement based on the likelihood-of-success/risk-of-loss factor.[3]

We recognize that the contingency factor could be accounted for within the initial lodestar calculation. A court could simply enhance the "reasonable" hourly rate used in calculating the lodestar and forgo post-lodestar adjustments. *See, e.g., Copeland*, 641 F.2d at 893 ("To the extent . . . that an hourly rate underlying the 'lodestar' fee

---

[2]The Court reiterated the presumptive reasonableness of the lodestar fee in *Blanchard*, but did so there only to rebut the suggestion that a fee arrangement set in a contingent-fee contract should govern as a strict ceiling on a court-ordered fee in the same case. *See* 489 U.S. at 95.

[3]The majority's extended discussion of whether the five votes that adopt this position constitute a binding majority of the Court seems to us overly pedantic, and mostly irrelevant. It is axiomatic that lower court judges routinely consider and weigh the diverse statements in Supreme Court opinions, especially those propositions garnering a majority, to seek guidance in the disposition of subsequent cases. Indeed, that is precisely what our sister circuits have done in construing *Delaware Valley II*.

itself comprehends an allowance for the contingent nature of the availability of fees in Title VII litigation . . . , no further adjustment duplicating that allowance will be made."); *Berger, supra,* at 325-26. This approach is problematic because there really is "no such thing as a market hourly rate in contingent litigation." 2 M. DERFNER & A. WOLF, *supra,* ¶ 16.04[4][a], at 16-100.15. Accordingly, most courts choose to employ "real" hourly rates in the lodestar calculation — *i.e.,* "the normal hourly charge in the community for noncontingent, contemporaneous payment in litigation of similar complexity and difficulty, by a lawyer with similar experience and reputation," *id.,* ¶ 16.03[1][a], at 16-47 (footnotes omitted)[4] — and only later adjust the product upward to account for the contingency factor. *See id.*, ¶ 16.04[4][a], at 16-100.15-.16. The difference in the mathematical formulas makes no difference in the result, of course, so long as the court is careful to avoid "double-counting" by blending the two approaches. *See Copeland,* 641 F.2d at 893. The point here is, however, that under the approach followed by most courts — and followed by the District Court in this case — the contingency factor is *not* subsumed within the initial lodestar calculation; consequently, if the lodestar is not itself adjusted upward, the lawyer's economic risk will go uncompensated.

The majority rejects the prevailing view that enhancements are available because it can find no governing principle in *Delaware Valley II.* With no precedent or logic to support its opinion, the majority simply decides that contingency enhancements never should be permitted. This rule is created completely out of new cloth. Neither the plurality, concurring, nor dissenting opinion in *Delaware Valley II* holds that contingency enhancements are *never* available. In a sweep of reasoning that defies comprehension, the majority attempts to dismiss Part V of Justice

---

[4]The Supreme Court acknowledged as much in *Blanchard* when it stated that the lodestar figure is to be derived by "applying *prevailing billing rates* to the hours reasonably expended on successful claims." 489 U.S. at 94 (emphasis added).

White's plurality opinion because Justice O'Connor declined to join this portion of the plurality. But, of course, as is clear from the Court's opinion, Part V remains as written and means what it says: *see, e.g.*, 483 U.S. at 728 ("enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification ... are readily apparent and are supported by evidence in the record and specific findings by the courts"); *id.* at 731 ("[A] fee award should be informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help. Before adjusting for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market."). Whatever substantive criteria these statements may stand for, they certainly do not reflect a *per se* rule against contingency enhancements. In any event, the one thing that is absolutely clear from *Delaware Valley II* is that the Supreme Court *declined* to reject the possibility of contingency enhancements.

Furthermore, the majority in this case, having decided that *Delaware Valley II* does not control interpretation of the fees statute, does absolutely no work to interpret the statute. Rather, the majority relies on the utterly irrelevant proposition that "the question of attorney's fees must not turn into major litigation itself," *see Delaware Valley II*, 483 U.S. at 722, to reach a *per se* rule barring all contingency enhancements. Of course, the majority's fear could be avoided equally well by routinely granting contingency enhancements. Even a test which looks to whether, in the relevant market, contingency fees are needed to induce attorneys to represent plaintiffs in these actions, will not create much hardship after district and circuit courts establish precedent regarding the major markets. Given that the contingency enhancement question merely asks the court to decide the prevailing market for legal services, it is no more onerous than any other fee inquiry.

The majority's result also files in the face of the decisions from *every* circuit that has considered the issue since *Delaware Valley II*. In creating a split in the circuits, the majority now causes the D.C. Circuit to stand oddly alone on this question. Of the thirteen circuits applying *Delaware Valley II*, none — save the D.C. Circuit — has completely ruled out contingency enhancements. *See, e.g., Jacobs v. Mancuso*, 825 F.2d 559, 561 (1st Cir. 1987) (disallowing contingency, not because of *per se* rule, but because "liability here was so plain ... that, as a practical matter, the risk of not recovering a fee was all but eliminated"); *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295, 298 (2d Cir. 1987) (fee enhancement available when "[w]ithout the possibility of a fee enhancement ... competent counsel might refuse to represent ... clients thereby denying them effective access to the courts") (quoting *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986)); *Kelly v. Matlack*, 903 F.2d 978 (3d Cir. 1990) ("in order to qualify for an enhancement, a plaintiff must establish that without adjustment it would have faced substantial difficulties in finding counsel in the ... relevant market") (citations omitted); *Craig v. Dep't of Health & Human Servs.*, 864 F.2d 324, 327 (4th Cir. 1989) (dicta) (reading *Delaware Valley II* to permit fees in "exceptional circumstances"); *Alberti v. Klevenhagen*, 896 F.2d 927, 936 (5th Cir.) (enhancement available when district court "make[s] the findings required by Justice O'Connor's concurrence in *Delaware Valley II*"), *reh'g granted in part*, 903 F.2d 352 (5th Cir. 1990); *Perotti v. Seiter*, 935 F.2d 761, 765 (6th Cir. 1991) ("This court has upheld multipliers for the risk of non-compensation in contingent-fee cases subsequent to *Delaware Valley*.") (citing *Fite v. First Tennessee Production Credit Ass'n*, 861 F.2d 884 (6th Cir. 1988)); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 553 (7th Cir. 1991) (following Justice O'Connor's test as the *Delaware Valley II* "holding"); *Morris v. American Nat'l Can Corp.*, 941 F.2d 710, 715 (8th Cir. 1991) ("Justice O'Connor's opinion in *Delaware Valley II* is the current legal standard for awarding contingency enhancements.... We are persuaded that the district court

abused its discretion in concluding that [plaintiff] failed to establish that she would have faced substantial difficulties in retaining counsel absent risk enhancement."); *Bouman v. Block,* 940 F.2d 1211, 1235-36 (9th Cir. 1991) (upholding fee on the basis of district court's findings matching Justice O'Connor's test), *petition for cert. filed,* 60 U.S.L.W. 3344 (Nov. 5, 1991); *Smith v. Freeman,* 921 F.2d 1120, 1123 (10th Cir. 1990) (quoting the *Delaware Valley II* plurality that "enhancement for the risk of nonpayment should be reserved for exceptional cases where the need and justification for such enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts"); *Martin v. University of South Alabama,* 911 F.2d 604, 610-12 (11th Cir. 1990) (following Justice O'Connor's test); *Crumbaker v. Merit Systems Protection Board,* 827 F.2d 761, 761 (Fed. Cir. 1987) ("the Board on remand shall consider the degree to which the relevant market compensates for contingency and whether any enhancement is necessary to bring the fee within a range that would attract competent counsel").

Additionally, despite the majority's assertion that the tests developed in many circuits are "difficult, if not impossible, to meet," even courts of those circuits have continued to award contingency enhancements in some circumstances. *See, e.g., Morris v. American Nat'l Can Corp.,* 941 F.2d 710, 716 n.2 (8th Cir. 1991); *Curry v. Contract Fabricators Inc. Profit Sharing Plan,* 891 F.2d 842, 849-50 (11th Cir. 1990); *Shirley v. Chrysler First, Inc.,* 763 F. Supp. 856, 860 (N.D. Miss. 1991); *Vargas v. Calabrese,* 750 F. Supp. 677 (D.N.J. 1990); *Bauman v. Jacobs Suchard, Inc.,* No. 89 C 5452, 1991 U.S. Dist. LEXIS 8847 (N.D. Ill. 1991).

Thus, setting aside the more contentious question of what degree of enhancement is appropriate, there ought to be no dispute that *some* upward adjustment of the lodestar fee is permissible where the prevailing attorney assumed the greater risk inherent in contingent-fee cases. There is simply no justification — in the statute, in the case law or in common sense — for the suggestion that

contingent-fee lawyers may not be fully compensated for their services.

II.

With regard to the particular facts of this case, there is no basis under the abuse-of-discretion standard of review to overturn the District Court's decision to allow a 50% enhancement of the lodestar fee submitted by Ms. King's counsel. Although the Supreme Court's guidance concerning the appropriate method for *calculating* a contingency adjustment has been regrettably uncertain, the trial court's decision in this case is consistent with what standards can be gleaned from recent cases.

The clearest instruction found in the Supreme Court's cases is that fee awards must be tied to evidence of the fee practices prevailing in the local legal market. *See, e.g., Jenkins,* 491 U.S. at 283, 285; *Blum,* 465 U.S. at 894-95; *Delaware Valley II,* 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 754 (Blackmun, J., dissenting). That was done in this case. In reaching its determination, the District Court expressly relied upon attorney affidavits filed by the plaintiff and an earlier decision in the same district in which another trial judge had found that "attorneys in the Washington[,] D.C.[,] community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent." *See Palmer v. Shultz,* 679 F. Supp. 68, 74 (D.D.C. 1988), *quoted in King v. Palmer,* Civ. Action No. 83-1980, mem. op. at 4 (D.D.C. Sept. 20, 1988).

Another way to assess the reasonableness of the fee amount awarded by the District Court is pursuant to the two-prong test set forth in Justice O'Connor's concurring opinion in *Delaware Valley II.* Although it is unclear what precedential force that opinion should be given, *cf. Marks v. United States,* 430 U.S. 188, 193 (1977), it is nonetheless a source of some guidance and it is further indication

that the judgment of the District Court should be affirmed in this case. Under the first prong of Justice O'Connor's test, lower courts would be required to "treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market." 483 U.S. at 733 (O'Connor, J., concurring in part and concurring in the judgment). Under the second prong, "the fee applicant bears the burden of proving the degree to which the relevant market compensates for contingency." *Id.* Under this second prong, "no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" *Id.* (quoting from plurality opinion, 483 U.S. at 731).

Under the first prong of Justice O'Connor's test, the District Court here reasonably concluded that "the relevant market" does in fact compensate lawyers for assuming the risk of contingent payment. In addition to the evidence cited in *Palmer v. Shultz,* which went directly to the degree to which the Washington, D.C., legal market customarily compensates for contingency, the court had before it several dozen affidavits from local attorneys swearing either that they generally demand an enhancement over normal hourly rates in order to accept contingent-fee cases or that they refuse such cases altogether because of the risk involved.

Under the second prong of Justice O'Connor's test, Ms. King was required to show that she "would have faced substantial difficulties in finding counsel" had contingency enhancements *not* been customarily available in the Washington, D.C., legal market. This proposition, of course, turning as it does on a counterfactual supposition, is difficult to prove. Nonetheless, Ms. King produced an affidavit from her attorney stating that he would not have taken her case without the prospect of a fee enhancement. *See* Declaration of Robert M. Adler at 2 (Sept. 11, 1987), *reprinted in* Joint Appendix ("J.A.") 74, 75. In addition, she produced further affidavits from several Washington,

D.C., Title VII plaintiffs' attorneys corroborating that Ms. King likely would have faced substantial difficulties securing counsel without the promise of a contingency premium.[5] These attestations were reinforced by others documenting the general unwillingness of local attorneys to accept such cases absent some likelihood of receiving an enhancement for risk. On this record, we believe that Ms. King carried her burden under both prongs of Justice O'Connor's test.

Because Title VII and the governing case law clearly permit trial courts to enhance attorney's fees to compensate for the risk of contingent payment, and because the facts of the instant case satisfy whatever standards can be gleaned from recent Supreme Court cases, it cannot be found that the District Court abused its discretion in shaping the fee award in this case. As we noted at the outset, the standard of review in this case is *abuse of dis-*

---

[5] In one affidavit, attorney George Chuzi stated:

> During 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorney who would have agreed in 1983 to represent her on a contingency fee basis (even had she agreed to pay up to $5,000 in legal fees). The only way in which I believe that a competent Title VII attorney would have been convinced to seriously consider this representation was if there was a reasonable possibility of receiving an enhanced fee for risk (over and above hourly rates) if Mrs. King prevailed.

Supplemental Declaration of George M. Chuzi at 2 (Dec. 21, 1987), *reprinted in* J.A. 130, 131; *see also* Declaration of David R. Cashdan at 4 (Apr. 25, 1986) ("I believe that it is highly unlikely that I would have agreed to act as sole counsel in this case."), *reprinted in* J.A. 112a, 112d; Declaration of Robert B. Fitzpatrick at 2 (Apr. 24, 1986) ("I believe that the chances of prevailing in this case . . . were so remote that my firm would not have accepted representation of Mrs. King."), *reprinted in* J.A. 173a, 173b; Declaration of Barry H. Gottfried at 2 (July 31, 1987) ("Had the plaintiff sought to retain me to represent her by filing a suit for the claims involved herein I do not believe that I would have accepted representation."), *reprinted in* J.A. 176, 177.

cretion. The majority, however, has simply ignored the constraints of appellate review in second-guessing the findings of the trial judge. Indeed, the majority's approach in this case borders on *de novo* review, in flat defiance of the Supreme Court's instruction that "[i]t is central to the awarding of attorney's fees ... that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case." *Blanchard,* 489 U.S. at 96.

III.

The fundamental problem with this case, as with other fee cases, is that the Supreme Court has yet to give us coherent guidance about how to determine the reasonableness of fee awards under Title VII and similar fee-shifting statutes. In this, we share the majority's frustration, if not its solution. In particular, we do not yet know under what circumstances to award a contingency enhancement, nor do we know whether the degree of enhancement allowed by the courts merely *reflects* prevailing market rates or actually *creates* the relevant market forces by defining the extent to which economic risk will be compensated.[6] In our view, the proper answers to these questions ultimately must come from Congress.

Logically, of course, the size of a contingency enhancement should be determined in each case according to the degree of risk actually incurred by the prevailing attorney. It is impossible to determine with any confidence what a "reasonable fee" would be in any particular contingency case without first assessing just how much risk the

[6]For example, as Judge Williams has pointed out, if courts generally allow a contingency enhancement of 50%, lawyers will have an economic incentive to bring only those cases in which the odds of succeeding on the merits are at least two-to-one; if the court-ordered enhancement figure rises to 100%, lawyers will presumably bring any case in which the chances of winning are at least 50%. *See King v. Palmer,* 906 F.2d 762, 770 (D.C. Cir.) (Williams, J., concurring in panel decision), *vacated & reh'g en banc granted,* 906 F.2d 772 (D.C. Cir. 1990).

plaintiff's lawyer actually assumed.[7] *See, e.g.,* S. SPEISER, *supra,* § 8:10, at 320; Berger, *supra,* at 326. In this regard, the Court's apparent disapproval of case-by-case risk assessment, *see Delaware Valley II,* 483 U.S. at 731 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 745-46 (Blackmun, J., dissenting), serves only to frustrate the lower courts as they struggle to shape fee awards that, consistent with legislative purpose, will be "adequate to attract competent counsel" while stopping short of "produc[ing] windfalls" for plaintiffs' lawyers, *see Blum,* 465 U.S. at 897 (quoting S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976)).

Although we share Justice O'Connor's concern that risk enhancements not be calculated or awarded in "an arbitrary or unjust" manner, *Delaware Valley II,* 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment), our experience suggests that the two-prong test enunciated in the concurring opinion in *Delaware Valley II* cannot be applied without difficulty. The panel

[7]In this respect, a risk enhancement arguably should not encompass hours of labor for which compensation was secure. In the instant case, the argument could well be made that the risk of nonpayment incurred by Ms. King's counsel virtually vanished after this court decided the merits in Ms. King's favor in 1985. In *King v. Palmer,* 778 F.2d 878 (D.C. Cir. 1985), this court reversed the District Court's entry of judgment for the defendants and remanded the matter with instructions "to enter judgment for Ms. King and to determine an appropriate remedy." *Id.* at 882 (footnote omitted). "At a minimum," we noted, "it appears that the appropriate remedy in this case should include the promotion of Ms. King ..., her receipt of back pay, and a full consideration of any further relief." *Id.* at 882 n.7. Once Ms. King prevailed on the merits of her main claim, the defendants recognize, she qualified for an award of fees for "hours reasonably expended [thereafter] on remedial and similar ancillary matters." *See* Brief for Appellees/Cross-Appellants at 39. At least once it was established that there would be no review of the merits in the Supreme Court, there remained no risk of nonrecovery. Accordingly, the District Court probably could have, within the bounds of its discretion, eliminated from the risk-enhancement calculation fees for post-1985 work for which lodestar payment was certainly due.

opinions in this case and in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), illustrate the two dilemmas inherent in this test. First, although the affidavits in both cases clearly establish that lawyers routinely demand the equivalent of a significantly higher hourly fee if they accept a case on a contingent-fee basis, those same affidavits also demonstrate that there is no one "market rate" or contingency fee arrangement for all such cases.[8] Instead, lawyers predictably evaluate the case of each potential client independently and decide whether to accept representation and what to charge based on their estimation of the likelihood of success and the amount of fees they will receive if they do, in fact, prevail.[9] Consequently, it is arguably unrealistic to assume that a court can determine one specific level of enhancement that the market demands in contingent-fee cases "as a class."

Second, the so-called "substantial difficulties" test is a confusing and potentially mischievous requirement. For example, the requirements that the court determine the amount of enhancement by looking at contingency cases as a class, and that it look at the circumstances of the particular case only to determine if the plaintiff would have had substantial difficulty in obtaining counsel without the enhancement, force trial judges to award contingency enhancements on an all-or-nothing basis. The judge

[8]To the contrary, lawyers claimed to demand contingency enhancements from 33% to 300% of their regular hourly rates. Other lawyers did not specify a percentage, saying only that they needed a "reasonable" risk enhancement to accept a Title VII case on a contingent basis.

[9]As a result, the lawyer and client may tailor the terms of the contract to address the risks and potential rewards involved in each case. *See, e.g.*, Declaration of Nora A. Bailey at 2 (Aug. 12, 1987), *reprinted in* J.A. 82, 83; Declaration of John R. Erickson at 2 (Nov. 16, 1987), *reprinted in* J.A. 168, 169; Declaration of Chester T. Kamin at 2-3 (Aug. 24, 1987), *reprinted in* J.A. 193, 194-95; Affidavit of David N. Webster at 6 (Sept. 20, 1982) ("The greater the uncertainty of result, the greater the percentage fee may be, albeit always within the limit of reasonableness."), *reprinted in* J.A. 289, 294.

must either award the supposed "market" risk enhancement or no enhancement at all; there is no leeway for the court to decide that some enhancement is appropriate, but that it should be less than the previously determined "market" rate. Although the awards calculated by this method are concededly uniform, they may be nonsensical insofar as they overcompensate some plaintiffs with not-so-risky cases while inadequately compensating others with especially risky ones.

Consequently, we believe that district judges, in enhancing the lodestar to account for the risk of nonpayment, should have the same discretion that they have in determining other components of the reasonable fee. Although no one formula can be devised for all cases, we think that district courts should consider both the size of the attorney's investment in the case and the likelihood that that investment would not be recouped. For one thing, in determining whether a contingency enhancement is necessary to enable the plaintiff to secure counsel, the court could consider the amount that the lawyer would lose if the plaintiff did not prevail. *See Delaware Valley II*, 483 U.S. at 747-48 & n.12 (Blackmun, J., dissenting); *Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 613-14 (1st Cir. 1985). The court thus might consider factors such as

> what, if any, payment the attorneys would have received had the suit not been successful; what, if any, costs or expenses the attorneys would have incurred if the case had been lost; the extent to which the attorneys were required to compensate associates and to carry overhead expenses without assurance of compensation; and whether other attorneys refused to take the case because of the risk of nonpayment.

Delaware Valley II, 483 U.S. at 748 n.12 (Blackmun, J., dissenting). In our view, contingency enhancements are appropriate if the lawyer has to expend a substantial amount of her time and resources to litigate a case and there is a significant risk of not prevailing (and thus of not recouping her investment).

For another thing, the court could consider the plaintiff's likely "ability to prove liability and damages . . . [and the legal precedent] either in favor of or against the theories put forth in the case" in order to determine the magnitude of the risk that the plaintiff would not prevail. *See Wildman*, 771 F.2d at 612. We recognize that it is impossible to determine such risk with any mathematical precision, and we are cognizant of the supposed ethical tensions such calculations may engender,[10] but we do

[10]The plurality summarized these concerns in *Delaware Valley II*:

> [E]valuation of the risk of loss creates a potential conflict of interest between an attorney and his client, for in order to increase a fee award, a plaintiff's lawyer must expose all of the weaknesses and inconsistencies in his client's case, and a defendant's attorney must either concede the strength of the plaintiff's case in order to keep down the fee award, or "allo[w] the fee to be boosted by the contingency bonus [by] insisting that the plaintiff's victory was freakish."

483 U.S. at 721-22 (quoting Leubsdorf, *supra*, at 483). The latter of these concerns is, of course, not an attorney-client conflict at all, but simply a strategic dilemma for the defendant of the sort that is not unknown in litigation. To the extent that the first represents a genuine potential for attorney-client conflict, we are reassured by the confidence the Supreme Court has previously expressed for lawyers' ability to put their clients' interests ahead of their own. *See Evans v. Jeff D.*, 475 U.S. 717, 727-28 (1986) ("Although respondents contend that Johnson, as counsel for the class, was faced with an 'ethical dilemma' when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interests between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do not believe that the 'dilemma' was an 'ethical' one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently.") (footnote omitted; emphasis in original). If a lawyer can be trusted to serve his client faithfully at the cost of his entire statutory fee award, we feel sure he can be trusted to do so at the cost of some potential diminution of it.

think that a district court judge, who is familiar with the factual and legal development of the case, can differentiate — after the fact — among cases based on the probability of success in the beginning. As the plurality in *Delaware Valley II* recognized, in some cases there is very little risk of not prevailing, and no enhancement for contingency, or only a very small one, should be awarded.[11] In other cases, the risk of not prevailing would be substantial and the enhancement should be correspondingly enlarged.[12]

In the absence of further guidance in this area from Congress or the Supreme Court, however, we would adhere to the only secure legislative directive available to us — that assessments of what constitutes a "reasonable attorney's fee" are to be left to the sound and reasoned discretion of trial judges. A decade ago, this court, sitting *en banc*, acknowledged the inherent lack of certainty in this enterprise but concluded that such determinations were nonetheless best left, as Congress intended, with trial judges:

> To the district court judge falls the task of calculating as closely as possible a contingency adjustment with which fairly to compensate the successful attorney. We have not . . . lost sight of the fact that this adjustment is inherently imprecise and that certain estimations must be made. For example, it is difficult in hindsight to determine the risk of failure at the commencement of a lawsuit that ultimately proved to be successful. Thus, we ask only that the district court judges exercise their discretion as conscien-

[11]The plurality in *Delaware Valley II* voted to reverse the 50% risk enhancement of lodestar fees incurred to enforce a consent decree in part because there was not "a real risk of not persuading the District Court to enforce its own decree." 483 U.S. at 730.

[12]In saying that the district court should have the discretion to tailor the contingency enhancement to the particular case, we are not saying that the experience of other similarly situated plaintiffs can be disregarded. To the contrary, we think that the success rate of other plaintiffs who have filed suits based on similar legal theories is a good indicator of the risk presented in the case.

tiously as possible, and state their reasons as clearly as possible.

Copeland, 641 F.2d at 893 (footnote omitted).[13] We can perceive no reason to depart from that conclusion today. Because we discern nothing in the District Court's judgment that would suggest an abuse of discretion justifying reversal, and nothing at all supporting the majority's new legal rule, we dissent.

---

[13]The court further observed:

> The setting of contingency adjustments is particularly within the expertise of the District Judge. As the Supreme Court said long ago, the District Court "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees v. Greenough*, 105 U.S. 527, 537, 26 L.Ed. 1157 (1882).

Copeland, 641 F.2d at 893 n.24.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 17, 1989 Decided June 26, 1990

No. 89-7027

MABEL A. KING, APPELLANT

v.

JAMES F. PALMER, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, *et al.*

No. 89-7028

MABEL A. KING

v.

JAMES F. PALMER, DIRECTOR, D.C. DEPARTMENT OF CORRECTIONS, *et al.*, APPELLANTS

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 83-1980)

Robert M. Adler for appellant/cross-appellee Mabel A. King. *Joel P. Bennett* also entered an appearance for Mabel A. King.

Donna M. Murasky, Assistant Corporation Counsel, with whom *Herbert O. Reid,* Senior Acting Corporation Counsel, and *Charles L. Reischel,* Deputy Corporation Counsel, were on the brief, for appellees/cross-appellants Palmer, *et al. Susan S. McDonald* also entered an appearance for Palmer, *et al.*

Before EDWARDS, BUCKLEY, and WILLIAMS, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Concurring opinion filed by *Circuit Judge* WILLIAMS.

BUCKLEY, *Circuit Judge*: These appeals arise from a dispute over attorney's fees sought by Mabel A. King, the prevailing party in a Title VII lawsuit against the District of Columbia and James F. Palmer, Director of the D.C. Department of Corrections (collectively, the "District" or "District of Columbia"). King was represented throughout her lawsuit by counsel on a contingent fee basis. Following judgment on the merits, the district court awarded King attorney's fees and costs, as well as an enhancement for the risk of nonpayment equal to fifty percent of the fees for which counsel was at risk. The District of Columbia contends that *no* enhancement was proper, or alternatively that the level of enhancement should have been only twenty-five percent or less. On the basis of prevailing practice in the Washington, D.C. legal market, we hold that King was entitled to a 100 percent enhancement of the amount of attorney's fees at risk. That enhancement, however, may not be awarded on time devoted to the litigation of fee awards.

I. BACKGROUND

Mabel King initiated this suit against her employer, the District of Columbia, in July 1983 in order to obtain relief from gender-based discrimination. In September 1984, the

district court entered judgment for defendants. On appeal, this court reversed and remanded, instructing the district court to enter judgment for King and to determine an appropriate remedy. *King v. Palmer,* 778 F.2d 878, 882 (D.C. Cir. 1985). We noted that the appropriate remedy should include, at a minimum, the promotion of King, an award of back pay, and "a full consideration of any further relief." *Id.* at 882 n.7. We remanded for further consideration King's related claims that she was the victim of a discriminatory work environment and of reprisals for having filed an EEOC complaint. *Id.* at 883. On remand, the district court awarded King a retroactive promotion and back pay, as instructed. The parties settled the claims of the discriminatory work environment and retaliation; the merits of the case are not at issue.

King was represented throughout the proceedings by Robert M. Adler, a sole practitioner, who was assisted on occasion by an associate and a law clerk or paralegal. The fee agreement between Adler and King provided that she would be responsible for billings of up to $5,000, as well as for costs and expenses. The agreement also provided that in the event King were to prevail and recover attorney's fees, she could recover any amounts paid, while Adler would receive whatever additional attorney's fees might be awarded. In effect, then, $5,000 of Adler's total fee was noncontingent.

As a result of this court's decision on the merits, King became entitled to an award of attorney's fees and costs pursuant to the fee-shifting provisions of Title VII. *See* 42 U.S.C. §§ 2000e-5(k), 2000e-16(d) (1982). Accordingly, in March 1986 Adler submitted an application for an interim award of attorney's fees and costs incurred through February 28, 1986. He requested a "lodestar" fee (the presumptive fee arrived at by multiplying a reasonable hourly rate by the number of hours reasonably expended on the litigation) of $210,160 (based on his historic billing rates), as well as a contingency fee enhancement of thirty-five percent.

By order dated June 11, 1986, the district court awarded interim lodestar fees of $95,937.76. In October 1986, Adler submitted a supplemental application for lodestar fees incurred from March 1 to October 20, 1986, in the amount of $34,485. In addition, he again requested a risk enhancement of thirty-five percent. By order dated February 27, 1987, the court awarded further interim fees of $7,938.

On June 10, 1987, the district court considered the balance of the fee requests and entered a memorandum and order awarding Adler additional lodestar fees and costs of $137,953.28. *King v. Palmer*, Civ. No. 83-1980, Revised Memorandum (D.D.C. June 10, 1987) ("Mem. Op. I"). The resulting total lodestar for the case to that point was $232,707.62, based on then-current billing rates. These fees represented compensation for *all* phases of the litigation, including time spent in pursuit of attorney's fees and time spent on various other matters following this court's remand, such as the defendants' petition for rehearing. As to the risk enhancement, the court retained jurisdiction of the matter pending the Supreme Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987). Mem. Op. I at 12. The court noted, however, that a "15 [percent] bonus for the risk of not prevailing would . . . be appropriate in the event that such an award is authorized by the Supreme Court." Mem. Op. I at 13. The court rejected Adler's claim for a bonus based on exceptional success, and that decision is not appealed here.

Following the decision in *Delaware Valley*, Adler again applied for a contingency enhancement, this time requesting an augmentation of 100 percent. On September 20, 1988, the district court awarded plaintiff a fifty percent enhancement for the risk of nonpayment, or a total of $113,858.31, based on the entire contingent portion of the previously awarded lodestar fee ($232,707.62 - $5,000 = $227,707.62). *King v. Palmer*, Civ. No. 83-1980, Memorandum at 5 (D.D.C. Sept. 20, 1988) ("Mem. Op. II").

The district court considered the request for risk enhancement under the standards established by Justice O'Connor's tie-breaking concurrence in *Delaware Valley*. The court found that King had offered evidence that "many lawyers in the civil rights employment discrimination market would not accept employment in a case like this on a purely contingency fee basis." Mem. Op. II at 3. The court asserted, however, that because the fee arrangement in the instant case was only partially contingent, it was distinguishable from the case of *McKenzie v. Kennickell*, 684 F. Supp. 1097 (D.D.C. 1988), *aff'd*, 875 F.2d 330 (D.C. Cir. 1989). Mem. Op. II at 3. Instead, the court relied on *Palmer v. Schultz*, 679 F. Supp. 68 (D.D.C. 1988), which also involved a partially contingent arrangement. Mem. Op. II at 3-4. There, the court had determined that "attorneys in the Washington D.C. community will only accept a fully contingent case if their recovery will be at least double their normal hourly billing rate and will only accept a partially contingent case if their recovery is enhanced by at least 50 percent." Mem. Op. II at 4 (quoting *Palmer*, 679 F. Supp. at 74). Adhering to Justice O'Connor's suggestion, in *Delaware Valley*, that "each court let a determination such as Judge Smith's [in *Palmer*] control future cases such as this one," the court adopted a fifty percent enhancement in the instant case. Mem. Op. II at 4.

Both King and the District appealed the enhancement award.

II. Discussion

The District contends that *no* risk enhancement should have been awarded or, in the alternative, that the level of the enhancement should have been twenty-five percent or less. King maintains that it should have been 100 percent of the amount at risk. The District also challenges certain elements of the risk enhancement award, claiming that it was excessive because it was based, in part, on a lodestar that included fees that were not at risk or for

which an enhancement was unnecessary to attract competent counsel. We address these issues in turn.

A. The Availability and Level of Risk Enhancement

In *McKenzie v. Kennickell*, 875 F.2d 330, 332-33 (D.C. Cir. 1989), we adopted Justice O'Connor's concurring opinion in *Delaware Valley*, 483 U.S. at 731-34, as the basis for determining the availability and level of contingency fee enhancements in this circuit. *See also Weisberg v. U.S. Dep't of Justice*, 848 F.2d 1265, 1272 (D.C. Cir. 1988); *Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988). We followed the two-part test suggested by Justice O'Connor: first, whether the relevant legal market adds a premium for contingency, and second, whether in the absence of an enhancement for risk the plaintiff would have faced substantial difficulty in finding counsel. *McKenzie*, 875 F.2d at 332.

1. *The Relevant Market Test*

To secure a contingency enhancement, a fee applicant must first show the degree to which the relevant legal market compensates for contingency. *Delaware Valley*, 483 U.S. at 733. The "relevant market," for purposes of this analysis, is composed of all contingency claims in the District of Columbia, with special reference to those involving complex federal litigation such as (but not limited to) Title VII cases. *McKenzie*, 875 F.2d at 334-35. In addition, the relevant market is to be determined as of the time the case was undertaken by counsel, rather than at the time fees were awarded. *Id.* In making such an assessment, "district courts and courts of appeals should treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market" in order to avoid "[h]aphazard and widely divergent compensation." *Delaware Valley*, 483 U.S. at 733. We thus rejected an individualized approach to fee awards. *McKenzie*, 875 F.2d at 332, 336, 338.

In awarding a fifty percent enhancement in this case, the district court correctly followed the principle of consistency in fee determinations discussed above, as it adhered to the previous contingency enhancement findings of *Palmer v. Schultz*, 679 F. Supp. at 74. Its error, however, was in applying different levels of enhancement to fully and partially contingent cases. The court asserted, without explanation, that there was a "crucial distinction" between such cases and thereby relied on the finding in *Palmer* that "plaintiffs 'have shown that attorneys in the Washington D.C. community will only accept a . . . partially contingent case if their recovery is enhanced by at least 50 percent.' " Mem. Op. II at 4 (quoting *Palmer*, 679 F. Supp. at 74).

Although the *Palmer* court's calculations of attorneys' fees are difficult to discern, it appears to us that it actually awarded an enhancement of 100 percent of the *contingent portion* of the fees—precisely the enhancement urged by King—even though the court referred to a fifty percent enhancement for partially contingent cases. Palmer was obligated to pay her counsel approximately fifty-three percent of their fees; thus, the case was about forty-seven percent contingent. *See* 679 F. Supp. at 73. Counsel charged plaintiff rates that were considerably below market. *Id.* at 71-72. The total lodestar award was $291,160.43, which was based on historic *market* rates. *Id.* at 76. For purposes of the enhancement, however, the court used a lodestar figure of $143,612.34, which was based on the historical rates actually charged by counsel. *See id.* at 73-76; Affidavit of Ellen Kabcenell Wayne, at 4 (counsel in *Palmer* describing calculation of fee enhancement). The enhancement award of $71,806.17, therefore, was exactly fifty percent of the lesser amount, and slightly over 100 percent of the contingent portion (forty-seven percent). *See Palmer*, 679 F. Supp. at 76.

Be that as it may, we conclude that the same percentage enhancement should be applied to the contingent portion of a fee regardless of whether the case is fully or partially contingent. None of the affidavits in the record reveals a practice of charging a lower percentage enhancement of the amount at risk in partially contingent

arrangements, nor do previous decisions in our circuit reflect such a practice. As an economic matter, such an approach makes little sense: we see no reason why Adler, whose fee was ninety-eight percent contingent, should not receive the same rate of enhancement as an attorney who accepted the case on a 100 percent contingent basis. In either case, the attorney would face the same risk of nonpayment for services rendered on a contingent basis, and should therefore be entitled to receive the same percentage enhancement on whatever portion of the lodestar that is at risk.

The question to be determined, then, is the level of enhancement prevailing in the relevant Washington market in 1983. King submitted declarations of over seventy practitioners in support of her contention that a 100 percent risk enhancement was required to ensure contingency representation in the Washington market. Although the District correctly observes that many of these affidavits refer only to a "reasonable" enhancement while others range from significantly below to significantly above 100 percent, we find that the bulk of the evidence supports a 100 percent enhancement as to both the current and the 1983 markets. *See, e.g.*, Declaration and Supp. Declaration of John R. Erickson; Declaration and Supp. Declaration of Joel P. Bennett.

The District nevertheless argues that as Adler himself initially requested only a thirty-five percent enhancement in this case and as he had been awarded only a ten percent enhancement in an earlier Title VII case, *see Bundy v. Jackson*, Civ. No. 77-1359 (D.D.C. Sept. 14, 1982), Adler could not reasonably have expected an enhancement of fifty percent, much less 100 percent, when he agreed to represent King. However true that may be, the District's approach would "contravene the settled doctrine . . . that fees must be awarded regardless of the identity of the fee petitioner." *McKenzie*, 875 F.2d at 338. In *McKenzie* we "reject[ed] the notion that applicants must demonstrate that they . . . were specifically attracted by the possibility of a contingency enhancement." *Id.* Rather, as Justice

O'Connor counseled in *Delaware Valley*, we treat contingency cases as a class, based on the prevailing practices within the relevant legal market.

That practice has now been defined, in a number of recent decisions within this circuit, as requiring a contingency enhancement of 100 percent for the class of cases relevant here. *See, e.g., Thompson v. Kennickell*, 710 F. Supp. 1, 6, 9 (D.D.C. 1989) (awarding enhancement of 100 percent and finding "that the attorney market in the District of Columbia requires contingency enhancements of 100% to 200%"); *Palmer v. Schultz*, 679 F. Supp. at 74 ("at least 100 percent" for fully contingent cases); *Broderick v. Ruder*, Civ. No. 86-1834, Mem. Op. at 4 (D.D.C. Sept. 13, 1989) (awarding 100 percent enhancement); *see also McKenzie*, 875 F.2d at 336 (upholding a 50 percent enhancement, which plaintiff had not appealed, as permissible but describing it as "below the Title VII contingency enhancements typically awarded in this circuit").

We note that although the 100 percent enhancement established by the Washington legal market is substantially higher than the upper limit of one-third urged by Justice White in his plurality opinion in *Delaware Valley*, 483 U.S. at 730, it does not provide attorneys with the incentive to take on cases "in which [they] believe[ ] there is less than a 50-50 chance of prevailing," which the plurality would discourage. *Id.* This is so because with a 100 percent enhancement, attorneys who calculate the risks of the cases they agree to litigate will only realize their non-contingent rates of compensation if they succeed in at least fifty percent of those taken on a contingency basis. Of course, some attorneys will undoubtedly choose to accept higher risk cases because of their personal belief in the cause, the novelty of the issue, or the potential importance of the case. Under our ruling, however, attorneys who accept such cases must bear the cost of the added risk.

To recapitulate, we hold that the district court erred as a matter of law in setting the enhancement at fifty per-

cent. Based on the standards of *McKenzie*, the record before us, and prior decisions within this circuit, we find that the appropriate enhancement to be awarded Adler for his risk of nonpayment is 100 percent of the amount of lodestar fees at risk. Moreover, in conformity with the goal urged by Justice O'Connor, and adopted by this court, that contingency cases within a given market be treated consistently, *see Delaware Valley*, 483 U.S. at 733; *McKenzie*, 875 F.2d at 332, we hold 100 percent to be the appropriate contingency enhancement to be awarded in the District of Columbia until new evidence indicates a significant change in the legal market—or until we receive new guidance for the award of contingency fees from either Congress or the Supreme Court.

2. *The Substantial Difficulty Test*

To prevail on her claim for fee enhancement, King must also establish, pursuant to the second prong of the *McKenzie* test, that in the absence of a risk enhancement, she would have faced substantial difficulty in securing the services of a competent lawyer at the time she sought one. *McKenzie*, 875 F.2d at 332, 336-38. This inquiry, we explained, is "necessarily a counterfactual [one]; [attorneys seeking enhancements] are not required to show that plaintiffs actually did face difficulty." *Id.* at 337. Nor is it necessary for them to demonstrate that they were "specifically attracted by the possibility of a contingency enhancement." *Id.* at 338.

The District contends that the award should be reversed because the district court made no finding that King would have faced substantial difficulties in securing counsel in the absence of risk enhancement. In addition, the District attacks the sufficiency of the evidence proffered by King, arguing that the affidavits submitted are not conclusive proof that there were no lawyers who would have taken King's case on a contingent basis without the possibility of enhancement. The District speculates, for instance, that a public interest group or possibly one of several private attorneys *might* have agreed to represent her, although its argument rests not on any affirmative evidence but merely on supposed ambiguities in certain of the affidavits submitted by King.

It is true that the district court did not explicitly find that King would have faced substantial difficulty in obtaining counsel in the absence of risk enhancement. That finding, however, was implicit in the court's citation to the *Palmer* court's findings that attorneys in the District would not accept contingent cases without some risk enhancement. Mem. Op. II at 2, 4. Moreover, the affidavits filed with the court make it abundantly clear that without this inducement, King would have faced substantial difficulty retaining counsel. *See, e.g.*, Supp. Declaration of George M. Chuzi ("During 1983, I was personally familiar with most of the attorneys regularly bringing Title VII suits in the District of Columbia on behalf of plaintiffs. Had Mr. Adler not agreed to represent Mrs. King in this case, I am unaware of any other Title VII attorney who would have agreed in 1983 to represent her on a contingency fee basis [without some risk enhancement].").

The District's attacks on the sufficiency of King's evidence are unavailing. The test adopted by this court does not require a showing that it would have been impossible to secure counsel on other than an enhanced contingency fee basis, as the District's arguments seem to assume; it requires only a showing of "substantial difficulty." Moreover, the evidence submitted need not be scientifically or statistically unassailable; "[e]vidence in the form of affidavits from practitioners is acceptable." *McKenzie*, 875 F.2d at 337-38. Here, King has met her burden.

Finally, we are unimpressed by the District's argument that Adler's willing representation is relevant evidence that King has failed to satisfy the "substantial difficulty" test. Adler himself declared in an affidavit that he would not have accepted the case without the possibility of risk enhancement. For its part, the District offered no evidence that Adler would have taken the case without risk

enhancement; it merely points to the fee agreement with King, in which Adler states the obvious fact that "there is no assurance" as to the amount of an attorney's fee recovery, if any. More fundamentally, however, it is irrelevant that Adler might have accepted King's case without an enhancement, *so long as* she was able to demonstrate (as she has) that hers is in a class of cases in which "plaintiffs *would have* faced 'substantial difficulties' [in securing counsel] in the absence of contingency enhancements." *McKenzie*, 875 F.2d at 337 (emphasis in original).

B. Challenged Elements of the Risk Enhancement Award

The District argues that even if some enhancement is appropriate, certain portions of the district court's risk enhancement award should be set aside. The District asserts, first, that the lodestar on which the enhancement was calculated should not have included fees for any time spent after December 13, 1985, when this court issued its decision on the merits, because such fees were no longer truly at risk.

We agree with the District that compensation for time devoted to securing an award of attorney's fees may not be enhanced. It is not disputed that the time spent litigating a fee award is itself compensable. *Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (en banc). Thus such compensation is not subject to a genuine risk of loss. Furthermore, as Adler himself admitted at oral argument, we doubt that lawyers require special incentives to pursue their own compensation. We therefore hold that contingency enhancements may not be applied to fees accrued in petitioning for, or litigating, fee awards. *See Baughman v. Wil[illegible]on Freight Forwarding Co.*, 583 F.2d 1208, 1219 (3d Cir. 1978) ("[H]ours devoted to the fee petition should not be augmented . . . because of the contingent nature of the case . . . .").

We affirm the district court, however, as to all the remaining elements of the lodestar. In originally calculating the lodestar, the district court fully addressed and discussed the compensability of Adler's time following this court's remand. *See* Mem. Op. I at 8-9, 15-18. From the district court's opinion, it is clear that King was not assured of victory on the merits at the time she incurred the post-remand fees. Rather, these fees related to the defendants' petition for rehearing, the United States' motion to file an *amicus* brief, and the retaliation and hostile work environment claims remanded by this court. Accordingly, "in view of the district court's superior understanding of the litigation," we conclude that the court properly based enhancement on all the contingent elements of the lodestar fee except that attributable to time spent in pursuit of attorney's fees. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Lastly, the District argues that the risk enhancement award was erroneously calculated on a lodestar that was computed using Adler's then-current, as opposed to historic, billing rates. The result, claims the District, was to magnify the amount appropriate to compensate for risk of loss by adding to the contingency enhancement an "interest" factor designed to compensate for delay in payment. Both parties concede that the use of then-current rates in calculating the lodestar was appropriate as compensation for delay in receiving fees—in other words, as the equivalent of interest. As the economic cost of the risk of nonpayment for which he is to be compensated began at the commencement of representation, we see no reason why counsel should not be compensated for the delay in receiving the enhancement award as well.

III. Conclusion

We hold that King is entitled to a risk enhancement of 100 percent of the amount of fees at risk. We also hold that the enhancement may not be applied to fees awarded for time spent on attorney's fees matters. We therefore reverse the order of the district court and remand for a

calculation of fee enhancement and entry of judgment in accordance with this opinion.

Reversed and Remanded.

WILLIAMS, *Circuit Judge*, concurring: I concur in the opinion of the court except for the passage at 8 that rests approval of the 100% enhancement on affidavits as to market conditions. I write separately to explain why I regard the selection of a risk enhancement figure as in reality a policy choice, one which we as courts are not qualified to make but are required to by controlling precedent. I conclude with a few thoughts on the implications of contingency enhancements with one-way fee-shifting.

I

The opinion's sifting of evidence as to the local market for work on a contingent fee in my view veils a policy judgment: a decision on what the minimum chances of victory must be for a case to be financed by the combination of fee-shifting with contingency enhancements. The answer is, in effect, to allow such financing for any case where the plaintiff's prospects of success are 50% or better.

Unless we impute irrationality to lawyers as a class, we must assume that they are ready to work on contingency at a whole range of premium levels that will, adjusting for the riskiness of the case and for their own risk aversion, make the contingent work the equivalent of noncontingent. Thus, momentarily putting aside risk aversion, if they can get double the basic fee, they will be ready to handle cases with a 50-50 chance of victory or better (the fee in half the cases, doubled, equals noncontingent reimbursement in 100% of cases); if they can recover triple the basic fee, they will be ready to take cases with a 33% chance of victory or better (the fee in one third of the cases, tripled, equals noncontingent reimbursement in all); and so on.

Risk aversion — the conventional preference for an assured $1000 over a 50-50 chance of $2000, or for a bird in the hand over two in the bush — may change the numbers slightly, but probably not a great deal; a large law office, at least, can diversify the risks over a large range

of cases. Of course to keep the risks satisfactory, lawyers must make sure to take pools of somewhat homogeneous cases; winning three $1000 cases will not balance losing three $100,000 ones.

We have here a slew of affidavits from local lawyers, many asserting an unwillingness to take contingent work on a basis of less than 100% enhancement, others a vaguer insistence on "reasonable" enhancement. I have some skepticism about the alleged insistence on 100% enhancement; if a lawyer can identify a class of cases with a two-out-of-three chance of success, he will need only a 50% enhancement to attain the equivalent of noncontingent pay. Justice White plainly recognized the point in his opinion in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), when he suggested a percentage limit to deter lawyers from bringing suits "in which the attorney believes there is less than a 50-50 chance of prevailing." *Id.* at 730. (Justice White set that percentage at 33 1/3%. In fact, this would require lawyers to insist on cases with a three-out-of-four prospect of success.)

If I am right as to the relation between riskiness and premium, the assertion of many lawyers that they will take a contingent fee case only at a 100% enhancement or better is puzzling. One possibility is simply that plaintiff has been much more assiduous than defendant at ferreting out supporting statements. Another is that fine-tuning the risk level in terms of a line between 50-50 and two-out-of-three is very difficult — clients do not tell the whole story, juries are a bit of a gamble, judges perhaps no better. Nonetheless, lawyers and clients do make judgments of this sort when they evaluate settlement proposals, so I suspect that if Congress set 50% as the maximum enhancement for a shifted contingent fee, a very considerable bar would develop to handle such business. In sum, I view causation as running in the opposite direction from that supposed by the controlling precedents; I see the judicial judgment as defining the market, not vice versa.

Thus the decision seems to me properly Congress's. For when we look beneath the veneer of market analysis, the allowance of a 100% enhancement is clearly legislative — making the policy judgment that it is suitable to allow use of enhanced contingent fee-shifting for cases with a 50-50 chance of success or better. I know of no basis on which a court would be competent to select that level — or any other. But given the various precedents aptly summarized in Judge Buckley's opinion, I believe we have no choice but to make the judgment. The only guidance that we have on the subject is section V of Justice White's opinion in *Delaware Valley*, a section joined by three other Justices. As I've already noted, that discussion points in two directions: the proposed 33 1/3% enhancement implies a minimum-prospect case with a .75 chance of success, but the proposed 50-50 minimum-prospect case implies a 100% enhancement. As my colleagues have chosen the 100% (and thus 50-50), and the entire legislative judgment is one on which I have no claim to authority at all, I certainly have no basis for dissent.

II

The implications of contingency enhancements with one-way fee-shifting are curious. In the normal contingency fee arrangement (i.e., without fee-shifting), the plaintiff's possible gain sets a limit on the investment of legal effort; it usually represents the sole source of any return on that investment. There will of course be cases of principle, but they will not feed or clothe much of the bar much of the time. To introduce one-way fee-shifting, as Congress has for Title VII of the 1964 Civil Rights Act; see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (construing fee-shifting section, which allows fees for the "prevailing party," as allowing awards to prevailing defendants only when plaintiff's claim was "frivolous, unreasonable, or groundless"), weakens but does not eliminate that barrier. It survives to a degree, because without enhancements for contingency, counsel must contract for enough of plaintiffs' possible recoveries

to compensate themselves for the time spent on unsuccessful suits. The enhancement for contingency lowers the barrier still further; where it is set at 100%, as here, all cases with a 50-50 chance or better become promising spots for investment of legal effort. (Plaintiff's potential recovery has a residual relevance even here, as agreements entitling the lawyer to part of the recovery provide an additional source of compensation for time spent on losers.)

But this does not mean that all 50-50 cases will be litigated to the hilt; a defendant can just give up. If one assumed that the stakes were symmetrical (a dollar gain for plaintiff being matched by a dollar's loss for defendant), the same forces that in conventional contingent-fee litigation limit the plaintiff's lawyer's investment would operate indirectly, through the defendant (though with the terms of the likely settlement affected by the one-way characteristic of the fee-shifting, a matter addressed below). Often, however, they will not be. For example, in a case by an employee claiming wrongful dismissal, there may be only a modest gain to the plaintiff from securing reinstatement; the next-best employment opportunity may be quite similar. But the employer may have come to the view that plaintiff's presence imposes substantial costs — salary (less the employee's positive contribution), plus negative effects on output. The present discounted value of these costs will represent a potential downside risk of the litigation for defendant.

In considering settlement, defendant will look at the following (at least) as the costs of persisting: (1) his additional legal fees; and (2) the costs of losing, including (a) monetary judgments, (b) the sort of costs suggested in the paragraph above, and (c) the costs of plaintiff's fee (adjusted for the risk enhancement), all adjusted for the likelihood of losing. Cf. George L. Priest, *Selective Characteristics of Litigation*, 9 J. of Leg. Stud. 399, 401 (1980). The rule we here adopt makes 2(c) a hefty item.

Two consequences emerge, then: First, adding contingent-fee enhancement to one-way fee-shifting

enlarges the class of cases that will be brought free of a conventional limit on the investment of legal resources in litigation, namely, the value of the litigation to the plaintiff. It thus implies an increase in the portion of the country's wealth to be devoted to litigation (mainly to lawyers). Second, adding enhancement for contingency greatly improves the plaintiff's bargaining power in settlement negotiations. As several opinions in *Delaware Valley* observed, enhancement of a shifted fee has the effect of making losing defendants pay not only their own litigation costs, and those of the plaintiffs to whom they lose, but also, indirectly, the fees of losing plaintiffs. See 483 U.S. at 719-20, 722 (section III-A of Justice White's opinion and thus the opinion of the Court); see also *id.* at 732 (O'Connor, J., concurring in part, and concurring in the judgment). But cf. *id.* at 752-53 (Blackmun, J., dissenting). As the fee-shifting is one-way only, this is not offset by any possibility of defendants' recovering their own legal expenses in the event of victory. The resulting enfeeblement of defendants' bargaining position alters the character of the settlements that will emerge, shifting the real-world impact of the substantive law toward plaintiffs. While one might argue that this shift merely counterbalances factors artificially impeding plaintiff recoveries and thus makes the net impact of the statute correspond to its language, it may in fact carry the balance far beyond that point.